No. 81 6970

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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SUPREME COURT, U.S.

JOHN BUGG, JR., Appellant

v.

INTERNATIONAL UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 507, AFL-CIO and KUNKLE VALVE COMPANY, INCORPORATED

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

1. Whether the Appellant's claim regarding the March 3, 1975 transfer from the New Britain machine to Deburring was time barred, due to changes in the Indiana Statute (IC 22-9-1-12&IC 22-9-1-12.1), even though it was processed by the Equal Employment Opportunity Commission under 42 U.S.C. 2000 e-5(c).

2. If the Appellant's claims come under 42 U.S.C. 2000 e-5(e), shouldn't the timely filing be subject to waiver, estoppel, and equitable tolling.

3. If the Appellant has established a prima facie case of of discrimination against each of the Appellees.

4. If the Appellees' rebuttal of the evidence is a pretext.

5. If the Court's Rule 41(b) dismissal was appropriate.

6. If Pursuant to 28U.S.C. 61 or anyother applicable statute, the admission or the exclusion of evidence affected the substantial rights of the Appellant.

7. If the denial of relief for the Appellant against the Appellee-Union in charge number four is appropriate.

8. If the Appellant has been afforded the opportunity for discovery.

9. If the award of attorney's fees to both prevailing Appellees is appropriate.

10. If the Appellee-Company is liable to the Appellant for breach of the commitment to repay past wages as stated in the Fort Wayne Metropolitan Human Relations Commission's staff memorandum dated 10/19/76.

TABLE OF CONTENTS

	Page
Questions Presented by the Appeal	1
Opinions Below	2
Jurisdiction	3
Constitutional and Statutory Provisions Involved	4
Statement of the Case	5
Statement of the Reasons	7
Appendix A	1a
Appendix B	6a
Appendix C	26a
Appendix D	31a
Appendix E	32a
Appendix F	34a
Appendix G	36a

TABLE OF AUTHORITIES

Cases:

California Brewers Assoc. et al., Petitioners v. Abram Bryant et al., 48 LW 4856..... 7

Drake Bakeries, Inc. v. Local 50, Am. Bakers, etc., Worker, 370 U.S. 254, 260-263, 82 S.Ct. 1346, 1350-1352, 8 L.Ed. 2d 474..... 7

McDonnel Douglas Cor. v. Green, 411 U.S. 792..... 7

Texas Dept. of Community Affairs, Petitioner, v. Joyce Ann Burdine, 49 LW 4214..... 8

Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967).. 7

Zipes, et al. v. TWA, Inc., et al., 50 LW 4238.... D

OPINIONS BELOW

The opinion of the district court on remand is not reported. The opinion of the court of appeals remanding the case to the district court (Appendix A, infra, 1a-5a). The original opinion of the district court (Appendix B, infra, 6a-26a).

STATEMENT OF THE GROUNDS

This employment discrimination action, was brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.. The date of the entry of the judgment is February 18, 1982. The notice of appeal was mailed to the United States Court of APpeals for the Seventh Circuit on May 17, 1982.

The Appellant believes that 28 U.S.C. 2101 confers jurisdiction on the appeal on the Supreme Court of the United States

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972

28 U.S.C. 103

28 U.S.C. 61:

> No error in either the admission or the exclusion of evidnce and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

NATIONAL LABOR RELATIONS ACT

STATEMENT

Charges of Racial Discrimination in Employment were filed by the Appellant against the Appellees with the Fort Wayne Metropolitan Human Relations Commission; The Office of Federal Contract Compliance; The Equal Employment Opportunity Commission. Prior to trial in District Court the Appellee's raised the question of timely filing under 42 U.S.C. 2000e-5(c)(e) The District Court ruled that the charges were timely filed, (see Trial Court's Memorandum of Decision and Order, Appendix C, infra, 26a-30a).

The question of the Appellant establishing a Prima Facie case first arose during trial in the District Court through the Appellee's proposed findings of facts. The Trial Court ruled that the Appellant failed to show Prima Facie racial discrimination against either Appellee, (see Trial Court's Memorandum of Decision and Judgment Order, Appendix B, infra, 6a-26a).

If the Appellee's rebuttal of the evidence is a pretext, was first raised in the Appellant's Brief to the Appellate Court.

If the Trial Court's Rule 41 (b) dismissal of the Appellant's charges was appropriate, was first raised in the Appellant's Brief to the Appellate Court.

The question pertaining to the admission or the exclusion of evidence was first raised by the Appellant in his motions to the Appellate Court. The Appellate Court denied the motions.

If the denial of relief for the Appellant against the Appellee-Union in charge number four is appropriate, was first made through motions presented to the Trial Court, (see Trial Court's Memorandum of Decision and Order, Appendix C, infra, 26a-30a).

The question of whether the Appellant had been afforded the opportunity for discovery was first raised in Pre-Trial proceedings. The Trial Court found that the Appellees had complied with discovery.

If the award of attorney's fees to both prevailing Appellees is appropriate. The Trial Court considered the motions of both of the Appellees.

The Appellate Court has affirmed all of the Trial Court's decisions.

STATEMENT OF REASONS

Without a plenary consideration of the foregoing questions, the Civil Rights of the Appellant shall be violated. The Trial and Appellate Courts have erred.

The Supreme Court has stated, "Evidence that may be relevent to any showing of pretext includes.....Petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to Petitioner's employment policy and practice may be helpful to a determination .....to a general pattern of discrimination against blacks." See McDonnel Douglas Corporation v. Green, 411 U.S. 792. It must be remembered that only 3% of the employees in production for the Appellee-Company are black.

The conduct of the Appellee-Company amounted to a repudiation of the contractual procedures, Cf. Drake Bakeries, Inc. v. Local 50, Am. Bakers, etc., Worker, 370 U.S. 254, 260-263, 82 S.Ct. 1346, 1350-1352, 8 L. Ed. 2d 474. Testimony of Richard Mohan, Vice President, of the Appellee-Company during the trial indicates that no other employee has been placed into a "floating" classification. The Appellee-Union failed to supervise the grievances of the Appellant through the steps of the bargaining agreement's procedure. See Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967). Both Appellees ignored the contractual agreement concerning seniority. See California Brewers Association et. al., Petitioners v. Abram Bryant et al., 48 LW 4856.

The Appellant belongs to a racial minority; the Appellant applied and was qualified for the job for which the employer was seeking applicants; and, despite the Appellant's qualification, the Appellant was rejected; and, after the Appellant's rejection, the position remained open and the employer continued to seek applicants qualification. The Appellee has not produced evidence that the Appellant was rejected for a legitimate, nondiscriminatory reason. In fact the actions of the Appellee were in conflict with the terms of its contractual agreement. See Texas Department of Community Affairs, Petitioner, v. Joyce Ann Burdine, 49 LW 4214.

This appeal warrants plenary consideration by the United States Supreme Court for the reason that the court of appeals erred in denying the appellant's motions to correct, modify, supplement, and strike matter from the record. The original papers and exhibits filed in the district court may have been deleted in violation of Rule 10 of the Federal Rules of Appellate Procedure (see Trial Court's Order, Appendix E, infra 32a-33a).

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1909

JOHN BUGG, JR.,

Plaintiff-Appellant,

v.

INT'L UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 507 AFL-CIO and KUNKLE VALVE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 78-C-7—Jesse E. Eschbach, *Judge.*

SUBMITTED FEBRUARY 3, 1982*—DECIDED FEBRUARY 18, 1982

Before PELL, BAUER, and POSNER, *Circuit Judges.*

PELL, *Circuit Judge.* This is an appeal from the district court's dismissal of the plaintiff's employment discrimination suit.

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." The plaintiff-appellant has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

The plaintiff, John Bugg, Jr., filed this suit, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, against the defendants, International Union of Allied Industrial Workers of America, Local 507, AFL-CIO (the Union) and Kunkle Valve Company, Inc. (the Company), on January 13, 1978. He alleged that the Company discriminated against him because of his race on four occasions: (1) on March 3, 1975, by transferring the plaintiff from his job on a New Britain machine to deburring; (2) on May 19, 1975, by transferring the plaintiff from his job on a Goss machine to deburring; (3) on September 15, 1975, by transferring the plaintiff from deburring to janitor/chip puller; and (4) by penalizing the plaintiff with a three-day suspension for taking a ten minute break. He also charged the Union with racially motivated breach of its duty of fair representation regarding the four incidents.

On May 19, 1979, the district court entered an order that dismissed the plaintiff's fourth claim against the Union because of his failure to file a proper EEOC charge. All other claims were scheduled to go to trial.

On December 19, 1979, the district court appointed counsel for the plaintiff. However, after counsel made a preliminary evaluation of the case, he moved for leave to withdraw on the ground that the plaintiff's claims were meritless. The court granted that motion.

Finally, on April 14, 1980, the trial was held. Thereafter, the court entered an order that (1) dismissed the plaintiff's first claim against both parties on the ground that it was time barred, and (2) dismissed the plaintiff's remaining claims under Fed. R. Civ. P. 41(b).[1] The court also awarded attorney's fees to the defendants. This appeal followed.

After filing his notice of appeal, the plaintiff made five separate motions in this court for modification of the

[1] The court also noted that "even if the plaintiff had established a *prima facie* case on any or all of the charges, it is clear from the evidence that the Company had sufficient, non-discriminatory reasons [for its actions]."

record.[2] Each of those motions required the defendants to respond. Although his first motion was initially granted, that order was later vacated.[3] His subsequent motions were all denied. We also denied the plaintiff's motion for appointment of counsel.

I

In this appeal, the plaintiff challenges the district court's dismissal of his substantive claims in several respects: (1) he argues that his first charge against both parties was in fact timely; (2) he questions the propriety of the court's Rule 41(b) dismissal on the grounds that there is evidence in the record inconsistent with that result, and that the defendants failed to present sufficient evidence to defeat his claims; (3) he raises an objection to the admission of an exhibit accepted by the district court; and (4) he states that he had difficulty discovering certain documents from the Union.[4] We reject each of these claims.

Time Bar

Under 42 U.S.C. § 2000e-5(e), an applicant must file a charge of racial discrimination with the Equal Employ-

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[2] Motion to Supplement the Record (3/23/81); Motion to Supplement the Record (4/3/81); Motion to Supplement the Record (5/1/81); Motion to Correct or Modify the Record (7/8/81); and Motion to Strike Matter from the Record (7/20/81).

[3] In an order issued June 9, 1981, this court explained that because the subject matter of the initial motion to supplement—a deposition of Bugg and copies of grievances—had never been filed in the district court, the original modification was improvidently granted.

[4] The plaintiff, in his reply brief, also urges that a certain deposition should be added to the record, and that the Company is liable to him for breach of a commitment to repay past wages. Because these issues were not presented in the plaintiff's initial brief, they are not properly before this court. Fed. R. App. P. 28(a); *American Meat Institute v. Environmental Protection Agency*, 526 F.2d 442, 459 (7th Cir. 1975).

ment Opportunity Commission "within three hundred days after the alleged unlawful employment practice occurred." The filing of such a charge within the statutory time limit is a jurisdictional prerequisite to the commencement of a Title VII action in district court. *Patterson v. General Motors Corp.*, 631 F.2d 476, 483 (7th Cir. 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 1988 (1981).

The incident underlying the plaintiff's first claim, *i.e.*, his transfer from a job on a New Britain machine to deburring, occurred on March 3, 1975. His first EEOC charge was not filed until February 3, 1976. Clearly it was out of time.

Rule 41(b) Dismissals

Fed. R. Civ. P. 41(b) provides that, at the close of a plaintiff's presentation of evidence, a district court may involuntarily dismiss his action if he has shown no right to relief under the facts and law. The court must make factual findings as provided in Fed. R. Civ. P. 52(a) to support such a judgment. In this instance, the district court's disposition conformed to that standard. The court articulated the requirements for establishing a *prima facie* case of discrimination against each of the defendants.[5] It then made findings indicating that, for each claim, the plaintiff failed to meet his burden of proof.

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[5] To establish a claim against the Union, the plaintiff was required to show: (1) that the company committed a violation of the collective bargaining agreement with respect to the plaintiff; (2) that the Union permitted that breach to go unrepaired, thus breaching its own duty of fair representation; and (3) that there was some indication that the Union's actions were motivated by racial animus. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To establish a claim against the Company, the plaintiff was required to show: (1) that he belongs to a protected class; (2) that he was qualified for the job from which he was transferred; (3) that, despite his qualifications, he was transferred; and (4) that, after his transfer, the job was filled

(Footnote continued on following page)

The plaintiff now points to several isolated passages in the record that he alleges are inconsistent with that result. His showing is inconsequential. We cannot conclude that the district court's findings were clearly erroneous, and thus we affirm the court's dismissal. *Patterson v. General Motors Corp.*, 631 F.2d at 487; *Penn-Texas Corporation v. Morse*, 242 F.2d 243, 246 (7th Cir. 1957).

In addition, the plaintiff's charge that the defendants failed to submit evidence of non-discrimination does not compel a different result. Because the plaintiff did not establish a *prima facie* case of discrimination, the burden never shifted to the defendants to respond. *Donaldson v. Taylor Product Div. of Tecumseh*, 620 F.2d 155, 159 (7th Cir. 1980).[6]

Admissibility of Exhibit

During the trial, the district court accepted Exhibit E, a foreman's report relating to the plaintiff's work on the Goss machine, submitted by the Company. At the time of its offer, the trial judge specifically asked the plaintiff if he had any objections to the admission of the exhibit. The plaintiff replied that he did not. Thus, the plaintiff is precluded at this stage from challenging the admissibility of the exhibit. Fed. R. Evid. 103(a); *United States v. Baskes*, 649 F.2d 471, 480 n.8 (7th Cir. 1980).

Problems of Discovery

In an order dated February 29, 1980, the district court granted the plaintiff a trial continuance on this same ground: that the defendants had not supplied him

[5] *continued*
by someone of the same qualifications as plaintiff, but not by a member of a protected class. *McDonnell Douglas Corp. v. Green, supra; Davis v. Weidner*, 596 F.2d 726 (7th Cir. 1979).

[6] Even assuming *arguendo* that the plaintiff established a *prima facie* case, the court also found that the Company articulated a legitimate, non-discriminatory reason for its actions. The plaintiff did not answer that rebuttal. *Gaballah v. Johnson*, 629 F.2d 1191, 1200 (7th Cir. 1980).

with requested information. Even at that time, however, the court noted that its response was prompted "out of an abundance of caution and because the plaintiff is acting pro se." Regarding the substantive claim, the court observed:

> [The plaintiff's complaint] is simply inaccurate, as the record reveals. The information has been made available to the plaintiff, and he was so advised. He has simply failed to pursue the availability of the information.

The plaintiff has made no showing to refute that finding. Thus, this final argument must also fail.

II

Beyond the plaintiff's substantive challenges, this appeal also presents a somewhat novel attorney's fees question. As noted earlier, the district court allowed the defendants attorney's fees for their trial work. That award is not contested. However, the Company requests this court to allow an additional award for its efforts in this appeal. This court has never analyzed the question of whether attorney's fees may be awarded to a defendant-appellee who prevails on appeal in a Title VII case. Thus, before responding to that request, we must examine our power in this area.

A

42 U.S.C. § 2000e-5(k) provides:

> In any action or proceeding under [Title VII] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . .

The statute, on its face, does not make distinctions on the basis of the alignment of the prevailing party or the nature of the court. We must ask whether there are reasons to read such distinctions into the section.

As to the question of whether a party's alignment is significant, the answer is clearly no. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Supreme

Court held that, under the statute, "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421. The Court noted that although some of the "strong equitable considerations counseling an attorney's fee award to a prevailing Title VII plaintiff . . . are wholly absent in the case of a prevailing Title VII defendant,"[7] nevertheless, in enacting the statute, Congress "wanted to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 418, 420. Thus, the Court affirmed the power of the district court to make the award.

There also appears to be no reason to impose a trial-appellate distinction in this scheme. The Fifth Circuit, in granting appellate attorney's fees to a prevailing Title VII plaintiff, has refused to make such a demarcation. *Marks v. Prattco, Inc.*, 633 F.2d 1122 (5th Cir. 1981). Although we have not had occasion to discuss this question under Title VII, we have rejected the distinction in an analogous context. In *Bond v. Stanton*, 630 F.2d 1231 (7th Cir. 1980), we found that 42 U.S.C. § 1988, a statute that also authorizes "a court to allow a reasonable attorney's fee to a prevailing party,"[8] could support an award of attorney's fees for appellate work to a prevailing civil rights plaintiff. Thus, we find that section 2000e-5(k) does confer power on an appellate court to allow a reasonable attorney's fee for appellate work to a prevailing Title VII defendant-appellee.

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[7] Namely: (1) the plaintiff is the chosen instrument of Congress to vindicate the policy of anti-discrimination in this context, and (2) when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.

[8] Thus, both sections belong to that more "flexible" class of attorney's fees statutes that neither mandate an award nor restrict an award to certain parties. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. at 415-16.

Returning to the teaching of *Christiansburg Garment Co.*, however, we also recognize that the Court cautioned that the exercise of the power to grant fees to a prevailing defendant must be made under a much stricter standard than is applied when considering awards to prevailing plaintiffs.[9] Logically, this limitation should also extend to a defendant-appellee. Thus, we find that an appellate court may exercise its power to award attorney's fees to a prevailing defendant-appellee only if the plaintiff's appeal is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[10]

B

Evaluating the circumstances of this case, it is apparent that an award of attorney's fees to both defendants for appellate work is appropriate. In its order dismissing the case, the district court explicitly found that the "plaintiff's claims against [the defendants] were entirely groundless." Moreover, the court noted that the plaintiff "knew or should have known [that his claims were frivolous] long before trial," and that court-appointed counsel clearly informed the appellant that the "case was wholly lacking in merit."[11]

In this appeal, the plaintiff, in a perfunctory brief, has failed to present any arguable reason why the district court erred in its disposition. He basically restates arguments that the lower court properly rejected. His additional allegations are either collateral or meritless.

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[9] A prevailing Title VII plaintiff should *normally* recover an attorney's fee unless special circumstances render such an award unjust. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

[10] Note that the standard focuses on the frivolity of the plaintiff's appeal. Although a district court's determination that the plaintiff's original action was frivolous or meritless may be probative of the efficacy of the appeal, such a determination is neither necessary nor sufficient to support an appellate award.

[11] *See* note 10, *supra*.

The plaintiff has also consumed considerable time and energy of both this court and the appellees by repeatedly attempting to modify the record on appeal. Finally, this court explicitly rejected the plaintiff's motion for appointment of counsel for this appeal. That should have served as a further indication that his objections were misguided.

We share the district court's "reluctance to award a defendant attorney's fees in any civil rights case, especially in an employment discrimination case, because of the danger of discouraging persons with valid claims from pursuing them." However, in view of the frivolity, unreasonableness, and lack of foundation that mark this appeal, we find that it is one of those "few troubling cases" in which Title VII defendants-appellees are entitled to attorney's fees for appellate work.

Accordingly, we affirm the judgment of the district court and remand for entry of an appropriate award of attorney's fees to the defendants-appellees for their appellate work in this matter. *Bond v. Stanton*, 630 F.2d at 1236.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

JOHN BUGG, JR.,

Plaintiff,

V.

INTERNATIONAL UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA LOCAL 507, AFL-CIO and KUNKLE VALVE COMPANY,

Defendants.

CIVIL NO. F 78-7

MEMORANDUM OF DECISION AND JUDGMENT ORDER

This employment discrimination action, brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., was tried to the court on April 14, 1980. Thereafter, all parties submitted proposed findings of fact and conclusions of law.

Plaintiff, a black citizen, charges that his employer, Kunkle Valve Co., Inc. (the Company), discriminated against him because of his race in four particulars: (1) on March 3, 1975, transferring plaintiff from working on a New Britain machine to deburring; (2) on May 19, 1975, transferring plaintiff from working on a Goss machine to deburring; (3) on September 15, 1975, transferring plaintiff from deburring to janitor/chip puller; and (4) penalizing plaintiff with a three-day suspension for taking a ten minute break.

Plaintiff also charges the International Union of Allied Industrial Workers of America, Local 507, AFL-CIO (the Union) with racially motivated breach of its duty of fair

representation of plaintiff regarding the four incidents. However, by order of May 18, 1978, this court dismissed claim four as against Local 507 for the reason that no such charge had been filed with the EEOC against the Union.

Plaintiff, John Bugg, Jr., filed this employment discrimination action on January 13, 1978. He had previously filed charges with the Fort Wayne Metropolitan Human Relations Commission and with the EEOC. Bugg received a notice of right to sue letter from the EEOC on November 10, 1977 and thereafter filed suit in federal court.

At trial, both the Company and the Union moved that plaintiff's claim regarding the March 3, 1975 transfer from the New Britain machine to deburring be dismissed on the ground that it is time barred. Although the transfer took place on March 3, 1975, plaintiff filed his first charge with the EEOC on February 2, 1976, well beyond the 300 days allowed by statute for the filing of charges with respect to which the person aggrieved has initially instituted proceedings with a state or local agency. 42 U.S.C. §2000e-5(e).

The motions to dismiss the first charge, taken under advisement at trial, will now be granted, and the first charge, regarding the transfer of plaintiff from the New Britain machine to deburring, will be dismissed as against both defendants.

Further, at the close of plaintiff's evidence, both defendants moved pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for a dismissal of the remaining aspects of the case on the ground that upon the facts and the law, the plaintiff had failed to make even a prima facie showing of entitlement to relief. Because plaintiff was proceeding pro se[1],

and because plaintiff had submitted a great deal of documentary evidence, the court deferred ruling on the motions until such time as the court could study and consider the documentary evidence.

Regarding the Union's motion to dismiss, it was plaintiff's burden to show (1) that the company committed a violation of the collective bargaining agreement with respect to plaintiff; (2) that the Union permitted the employer's breach

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[1] In an order entered by this court on December 19, 1979, this court, among other things, appointed T. Randall Berta, Esq., as counsel to represent plaintiff. However, that order contained a provision that if, after counsel investigated the facts and researched the law, he concluded that plaintiff's claim was wholly lacking in any merit, counsel was free to file a written report and seek leave of court to withdraw his appearance. On January 9, 1980, T. Randall Berta, Esq., filed a motion to withdraw his appearance and a memorandum in support thereof. The memorandum is, in effect, a report of the thorough investigation which counsel made of the alleged instances constituting discrimination. As a result of counsel's careful investigation and thorough research, counsel concluded "that plaintiff's case is wholly lacking in merit."

By order of January 10, 1980, the court deferred ruling on counsel's motion to withdraw until after the pretrial conference set for January 14, 1980. The court requested that counsel attend the pretrial conference and, under the unusual circumstances prevailing, bring his client with him. The court sought to assure itself that the plaintiff understood that counsel would be withdrawing before granting counsel's motion to withdraw.

At the pretrial conference, the court explained in detail to plaintiff the effect of the January 10, 1980 order and that the motion to withdraw would be granted and the reasons why the motion would be granted. Plaintiff, a college graduate, indicated that he fully understood what was occurring and he sought certain production and discovery on his own behalf from the defendant Kunkle Valve. The court made arrangements with counsel for said defendant during the pretrial conference for the production of the materials sought. Plaintiff was further advised that, under the circumstances, the court would not appoint any further counsel for the plaintiff but that he was at liberty to try his own case or to employ counsel. Plaintiff was then, and is still, gainfully employed by the Kunkle Valve Company.

The motion to withdraw of T. Randall Berta, Esq., was thereafter granted and all parties, including the plaintiff, were advised that the case would definitely be tried on March 6, 1980.

of the contract to go unrepaired, breaching its duty of fair representation; and (3) that such breach of duty was arbitrary, in bad faith, or motivated by racial animus. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048 (1976); Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967). See also, Cannon v. Consolidated Freightways Corp., 524 F.2d 290 (7th Cir. 1975).

Having now thoroughly considered the testimony and documentary evidence, the court finds that the plaintiff has wholly failed to meet his burden of proof concerning his claims against the Union and will grant defendant Union's Rule 41 motion to dismiss.

First, as will be discussed more fully below, plaintiff did not show that the company breached the collective bargaining agreement with regard to the plaintiff. Secondly, the plaintiff did not show that the Union failed to properly process any grievances which might have been submitted by him. In fact, plaintiff provided no specific evidence that he had ever filed any grievances pertaining to the transfers which precipitated his charges against the Union and the Company. Cf. Donaldson v. Taylor Products Division of Tecumseh Products Co., No. 79-1482 (7th Cir. April 10, 1980); Baldini v. Local Union No. 1095, 581 F.2d 145 (7th Cir. 1978). Nor did plaintiff present any evidence at all which would indicate racial animus on the part of the Union. Rather, plaintiff himself testified that his Union grievance committeeman, James Matson, had never said anything to plaintiff to indicate racial bias, that Harold W. Louden, a former Union president, had never said anything to indicate racial bias, and that no union official had ever made any racially biased comments to or about plaintiff.

Under these circumstances, the court finds that

plaintiff has wholly failed to meet his burden of establishing a prima facie case with respect to his claims against the Union, and will grant the Union's motion to dismiss made at trial.

As to plaintiff's three remaining claims against the Company, plaintiff also failed to establish a prima facie showing of discrimination. In order to establish a prima facie case as against the Company, it was plaintiff's burden to show (1) that he belongs to a protected class; (2) that he was qualified for the job from which he was transferred; (3) that, despite his qualifications, he was transferred; and (4) that after his transfer, the job was filled by someone of the same qualifications as plaintiff, but not by a member of a protected class. Cf. Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973).

Plaintiff is a black citizen and thus a member of a protected class. He was transferred on one occasion from a Goss machine to deburring, and on another occasion was transferred from deburring to janitor/chip puller. However, Bugg did not establish his qualification to work on either job, nor did he introduce any evidence at all as to who replaced him in the jobs from which he was transferred.

In fact, Bugg himself introduced evidence showing that he never learned to properly set up the machine from which he was transferred. Plaintiff's Exhibits 14 and 20. Plaintiff's evidence further showed that on several occasions he had caused serious and costly damage to the machine through his inability to properly set up and run it. Plaintiff's exhibit 14. As to the transfer from deburring to janitor/chip puller, Bugg's own evidence established that such a

transfer was fully justified under the collective bargaining agreement. Plaintiff's exhibits 1, 10, and 20.

Regarding the three-day suspension for insubordination, plaintiff introduced evidence that he refused to perform duties required of one holding the position of janitor/chip puller. Plaintiff's own testimony also tended to establish that as a "continuous shift" employee, he was not entitled to the break he took which was a second precipitating factor in his three-day suspension.

Thus, plaintiff did not establish a prima facie case as to any of the three remaining charges against the Company and the Company's Rule 41 motion to dismiss will be granted.

But even if plaintiff had established a prima facie case on any or all of the charges, it is clear from the evidence that the Company had sufficient, non-discriminatory reasons to transfer plaintiff from the Goss machine to deburring, and from deburring to janitor/chip puller, and to suspend plaintiff for three days for insubordination. Such transfers and the suspension were justified under the collective bargaining agreement.

Plaintiff was hired by Kunkle Valve Co., Inc. on October 7, 1974 as a New Britain Set Up and Operate Trainee "A." On March 3, 1975, plaintiff was removed from the New Britain job by the Company because he could not qualify. Plaintiff's Exhibits 14 and 20. Prior to plaintiff's removal from the New Britain machine, it was noted that plaintiff had difficulty in making set ups and in dealing with the variety of tools. It was observed that plaintiff's progress in learning and using information concerning the machine was slow, and that plaintiff "was not getting the job done

X

adequately."

Sam Boyd, the lead man on plaintiff's shift, testified that from October 1974 to December 1976 he was general foreman on the second shift. In that position, Boyd had personal contact with plaintiff. Boyd testified that plaintiff's performance on the New Britain machine was worse than on the Goss machine. He testified that although employees were expected to set up their own machines, plaintiff "never did get a set up on correctly; someone else had to do it for him."

Also, prior to plaintiff's removal from the New Britain machine, several meetings were held with the Company's personnel manager and the Union discussing removing plaintiff from the machine. But on March 3, 1975, plaintiff was removed from the machine due to lack of ability to perform the job. The testimony indicated that white employees had also been removed from the New Britain machine.

Having failed to qualify on the New Britain machine, and because there were no open jobs at that time, plaintiff was put into a floating classification until he could successfully bid on an open job or until a job would become open because no bids were received.

On May 19, 1975, plaintiff successfully bid on a Goss Set Up and Operate Trainee "A" position. Plaintiff stayed on this job until July 14, 1975 when he was removed by the Company because he could not qualify.

Plaintiff's work on the Goss machine was unsatisfactory. Again he had great difficulty setting up the machine and using the several tools necessary for the functioning of the machine. Sam Boyd testified that plaintiff required "constant help" in

getting the set ups in and that plaintiff had "numbers of 'wrecks'," more wrecks than the usual number. That is, plaintiff attempted to operate the machine when it was not properly set up, causing damage to the machine and tools. Defendant's Exhibit E. Boyd testified that he tried to talk to plaintiff about the problems with the machine but that plaintiff "wouldn't talk about it;" plaintiff "turned and walked away." Plaintiff also burned out a starting motor on the Goss machine "a couple of times" due to improper operation of the machine.

Because plaintiff could not qualify on the Goss machine, he was removed by the Company and again placed in a floating position until he could successfully bid on a job or until a job otherwise became available. White persons had also received "flunk bids" or failed to qualify on the Goss machine.

On September 15, 1975, when no bids had been received on a janitor/chip puller job, the Company properly transferred plaintiff from his job as a "floater" in deburring, to the open classification job of janitor/chip puller. Plaintiff's Exhibit No. 20.

Plaintiff's Exhibit No. 19 sets out the duties of a janitor/chip puller as follows:

> JANITOR - CHIP PULLER - STOCK HANDLER
>
> Perform duties of janitor as required.
>
> Remove turnings from machines. Must know different types of material in order to keep them separated for sale to scrap dealer.
>
> Must remove turnings and chips from each machine in such a manner that different materials can be run in machine and that no contamination of different materials will occur.
>
> Keeps stock in plant area in an orderly

condition, performing a combination of the following duties:

Transfer of materials by lift truck, when possible, hand truck, dolly or hand from receiving areas to storage areas, work areas or shipping.

Expedite the flow of materials and may provide a variety of manual duties for loading, unloading, and stock handling.

The duties actually performed by one assigned the position of janitor/chip puller varied between the first and second shifts, but the duties were the same for the second and third shifts. As a janitor/chip puller on the second shift, plaintiff was properly expected to clean and sweep around the machines, separate the types of metals taken from around the machines and place the metal in vats to be sold for scrap. From time to time, plaintiff was also properly expected to perform various stock handling tasks.

As a second shift employee, plaintiff worked a continuous shift. That is, plaintiff worked an eight hour shift and was allowed only a twenty-minute lunch break, usually scheduled around 7:30 p.m. Continuous shift workers are allowed no break other than the twenty-minute lunch break.

Plaintiff's three-day suspension or "involuntary layoff" for insubordination arose out of disagreements between plaintiff and Sam Boyd, plaintiff's general foreman, concerning an unauthorized break and plaintiff's refusal to carry out certain of the duties of his job as janitor/chip puller. On May 10, 1976 at about 9:00 p.m., Sam Boyd approached plaintiff while plaintiff was taking a break and directed plaintiff to "clean up the mess" plaintiff had made around a machine he had cleared of scrap metal chips. Plaintiff responded that Boyd could tell him to clean the machine but he could not tell him

to sweep the floor. Boyd had also asked plaintiff to get some parts for a machine that had been cleaned. Plaintiff responded that he was on his break and would do it after his break. Another employee was at the machine awaiting plaintiff's delivery of the parts before work could begin.

Boyd explained to plaintiff that as a continuous shift employee, he was not entitled to a break. But plaintiff insisted on and continued the break. Boyd also explained to plaintiff that as a janitor/chip puller, one of his duties was sweeping the floor. When plaintiff still refused to sweep the floor, the Union steward, James Matson, advised plaintiff to sweep the floor and file a grievance if he thought Boyd's directions were improper. Plaintiff still refused to do the work. A three-day suspension followed. Other employees, both black and white, had been required to sweep the floors as part of their jobs as janitor/chip puller. Further, other employees including two white employees and one hispanic employee had been given similar punishment, suspension, on the ground of insubordination.

For the foregoing reasons, the court finds that even if plaintiff had presented a prima facie case the Company was fully justified in its transfers and suspension of plaintiff, and that none of the Company's actions of which plaintiff complains were in any way racially motivated. Rather, the Company had legitimate nondiscriminatory business reasons for carrying out each of the actions of which plaintiff complains.

Plaintiff was allowed an opportunity to show that the Company's stated reasons for its actions were in fact pretext, but plaintiff offered no evidence in that regard.

Attorneys' Fees

At trial, defendant Union requested that this court order plaintiff to pay defendant Union's costs incurred in this action, including attorneys' fees. On April 24, 1980, defendant Company filed its verified petition for attorneys' fees pursuant to 42 U.S.C. §2000e-5(k). Both motions for attorney's fees are well taken and will be granted.

A district court may, in its discretion, award attorneys' fees to a prevailing defendant in an employment discrimination action upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978). "[A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 98 S.Ct. at 701.

The Christiansburg Garment Co. Court recognized that while Congress wanted to "clear the way for suits to be brought under the [Civil Rights Act of 1964], it also wanted to protect defendants from burdensome litigation having no legal or factual basis." Lower courts have also expressed this view. The Court of Appeals for the District of Columbia Circuit concluded:

> [From the congressional debates], two purposes for § 706(k) emerge. First, Congress desired 'to make it easier for a plaintiff of limited means to bring a meritorious suit'. . . . But second, and equally important, Congress intended to 'deter the bringing of lawsuits without foundation' by providing that the 'prevailing party'--be it plaintiff or defendant--could obtain legal fees.

Grubbs v. Butz, 548 F.2d 973, 975 (D.C. Cir. 1976).

In Feraci v. Hickey-Freeman Co., Inc., 607 F.2d 1025 (2d Cir. 1979), the court held that a pro se plaintiff should pay the defendant's attorneys' fees. The court stated that "the congressional goal of discouraging frivolous litigation demands that. . . fees be levied." As the court in Copeland v. Martinez, 603 F.2d 981 (D.C. Cir. 1979) pointed out, "Litigation brought merely to harass is a wholly unredeemed burden and affront to the judiciary."

In Kremer v. Chemical Construction Corp., 477 F.Supp. 587 (S.D. N.Y. 1979), the court also found an award of attorneys' fees to defendants justified. The court stated:

> We naturally resist imposing costs and fees on individuals who already carry with them, however unjustifiably in the law's eyes, a feeling of having been greatly wronged. Yet it is here that the courts must show courage and ingenuity. Instead of precluding suits under judicial doctrines such as res judicata, we should use statutorily granted powers to tax costs and fees in cases we have concluded are meritless. . . . With [the standard of Christiansburg Garment Co. v. EEOC], the assessment of attorney's fees is now available as a potentially effective device for protecting defendants from the burdens of meritless civil rights claims.

It is with great reluctance that this court orders an award of attorney's fees to prevailing defendants in an employment discrimination case. Award of fees to prevailing defendants is appropriate only under considerably more restrictive circumstances than those that would justify an award to prevailing plaintiffs. The purpose of an award to a prevailing plaintiff is to encourage vindication of congressional policy by a private litigant. An award to a prevailing plaintiff is an award against a violator of federal law; these considerations are not present in the case of a prevailing defendant. See

98 S.Ct. at 699. A prevailing defendant should be awarded attorney's fees only under special circumstances; otherwise, the risks for plaintiffs inherent in most litigation would be increased and the efforts of Congress to promote private enforcement of its policies would be undercut. Nevertheless, the requisite special circumstances are present in this case.[2] This is not merely a case in which plaintiff did not finally prevail. This is not a case in which decisive facts emerged only late in the proceedings, nor is it a case in which the law changed or was clarified after litigation was initiated. This is a case in which plaintiff knew or should have known long before trial that his claim was frivolous, unreasonable, and groundless. Plaintiff was told by court-appointed counsel that his claim was meritless. Even a plaintiff proceeding entirely pro se should have known that these claims were meritless. Plaintiff's education[3] and his experience as an employee in the industrial labor force should have provided him with the knowledge and perspective to enable him to recognize that these claims were meritless.

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[2] If, under the facts and circumstances of this case, this court were to deny defendants' motions for awards of attorneys' fees, that holding would preclude an award of attorneys' fees in any and all civil rights cases in which a plaintiff is proceeding pro se. While the impact of such a holding might be reduced by the appointment of counsel in each and every case, a requirement that counsel knowingly proceed in a frivolous case raises serious ethical questions under the Code of Professional Responsibility. Code of Professional Responsibility and Canons of Judicial Ethics adopted by the House of Delegates of the American Bar Association, EC 2-30, DR 2-109; Code of Professional Responsibility for Attorneys-at-Law and Judicial Conduct and Ethics adopted by the Supreme Court of Indiana, EC 2-30, DR 2-109.

[3] Plaintiff received a Bachelor of Arts degree in 1974. In October 1978, in his answers to interrogatories, plaintiff stated that he was then pursuing a Master of Science degree in psychology at St. Francis College in Fort Wayne, Indiana.

Each of plaintiff's claims against defendant Union and defendant Company were entirely groundless. Plaintiff, after having been given more than ample time for preparation of his case[4] and after having been given more than ample access to requested documents, was unable to produce any evidence which would indicate discrimination on the part of either defendant. Plaintiff had been treated no worse than any other employee of Kunkle Valve; in fact, there was evidence that plaintiff was treated better than many of the other employees in that the Company was more patient with plaintiff during the periods of time he was attempting to qualify on the New Britain and Goss machines.

Further, there was testimony that plaintiff rebuffed attempts on the part of the company to assist him in qualifying for jobs on which he bid. Sam Boyd testified that he tried to talk to plaintiff about problems plaintiff was having on the machines but that plaintiff would not talk about it; plaintiff "turned and walked away." The lead man and the foreman tried to assist Bugg; they met with him trying to work out any problems. They asked Bugg what he wanted the Company to do about the problems but Bugg "was silent."

Boyd explained Bugg's duties "time and time again,"

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[4]On February 29, 1980, only six days prior to the first scheduled trial, plaintiff filed a motion for continuance of the trial stating that he had not had sufficient time to employ counsel and that the defendants had not supplied certain information requested by plaintiff. The record revealed that plaintiff's statement regarding information was inaccurate. The information had been made available to the plaintiff, and he had been so advised. When at the January 14, 1980 pretrial conference the court expressly advised plaintiff that the trial would definitely commence on March 6, 1980, and that the plaintiff should be prepared, plaintiff made no request for additional time in which to obtain new counsel. Nevertheless, out of an abundance of caution, the trial was continued until Monday, April 14, 1980.

but Bugg "was beyond reckoning with." Boyd tried to explain the duties of janitor/chip puller to plaintiff but plaintiff refused to listen or obey Boyd's orders. He also failed to follow his Union steward's suggestion to obey Boyd's orders and then file a grievance later if he felt Boyd was wrong. At trial, plaintiff produced evidence indicating that Boyd's explanation of the duties of a janitor/chip puller was correct and his orders to plaintiff proper, yet plaintiff continued to prosecute the related charge against the Company. Plaintiff's exhibit 19.

Similarly, plaintiff himself introduced evidence indicating that plaintiff was justifiably removed from the Goss machine because he could not properly set up the machine. Such improper set up caused great damage to the machine. Such evidence had been available to plaintiff for several years, and plaintiff had been given ample opportunity to investigate his case, yet he failed to do so. Plaintiff also admitted at trial that he was never "qualified and given a classification as Goss trainee 'A'," yet his complaints of discrimination on the basis of the transfer from the Goss machine were based on an entitlement to remain on the Goss machine. Plaintiff had no claim to such an entitlement.

Plaintiff further admitted at trial that at the time he was transferred from deburring to janitor/chip puller he did not understand what a "floater" was. A floater is an employee with no specific classification who is assigned to various jobs, including deburring and janitor/chip puller, until he can successfully bid on a job which may lead to a classification. Bugg testified that he did not know what a "floater" was until after he had filed charges with the Fort Wayne Metropolitan Human Relations Commission. However, even

after he learned about the status of "floater," he continued to press his related claims against the Company and the Union.

One of the plaintiff's claims of discrimination involved the Company's allegedly denying him a break. Plaintiff testified at trial that "continuous shift" employees were not entitled to a break, but he further testified that he was not a continuous shift employee. An examination of plaintiff's time cards, which were fully available to plaintiff, shows that he was in fact a continuous shift employee and was not therefore entitled to a break. With a minimum of effort, plaintiff could have determined as early as 1976 that his claim based on the suspension was without merit.

Finally, Bugg could not point to any occasion on which anyone, from the Company or the Union, had said anything at all to him which would indicate racial bias against anyone including plaintiff. Nor could plaintiff state with specificity any occasion on which minority employees had been treated differently than white employees either by the Company or by the Union.

As set forth in defendant Company's April 24, 1980 verified petition for attorney's fees, plaintiff has otherwise been uncooperative in prosecuting this law suit. Plaintiff repeatedly failed to answer interrogatories propounded to him by the Company. Only after eleven months, upon order of this court, did plaintiff provide incomplete answers to the interrogatories. Plaintiff did not furnish defendants with a witness list prior to trial as requested by the court at pre-trial conference.

Plaintiff also engaged in frivolous and unreasonable delays by filing, only six days before trial, a motion for a continuance of the trial setting. In his motion for a

continuance, plaintiff alleged that the Company had not supplied him with information he had requested and that he did not have enough time to secure counsel. The court pointed out in its order granting the continuance that plaintiff's allegation that the Company did not supply him with requested information was "simply inaccurate, as the record reveals." Further, plaintiff had had two months since the withdrawal of court appointed counsel in which to find substitute counsel. Nevertheless, the court allowed a continuance.

Plaintiff was also informed by his court appointed counsel that his case was "wholly lacking in merit." After a thorough investigation of plaintiff's claims, plaintiff's counsel reported to the court and to plaintiff that none of plaintiff's claims was justified or had evidentiary support. In support of his conclusions, counsel observed:

> In the face of the substantial documentation produced by Kunkle Valve establishing their cause for each allegedly discriminatory act Mr. Bugg has supplied his attorney with no evidence beyond his mere allegations of discrimination.
>
> Mr. Bugg has no knowledge of nor has he been able to produce evidence of any other incidents of similar treatment of other minorities.

Nevertheless, this court recognizes plaintiff's right to proceed to trial notwithstanding counsel's evaluation of the claim. However, the evidence has now shown that plaintiff's claims against the Company and the Union were clearly frivolous and groundless, and plaintiff continued to litigate after he well knew his charges were unfounded. Under the standard set out in Christiansburg Garment Co. v. EEOC, an award of attorneys' fees to both prevailing defendants is fully justified in this case. Notwithstanding this court's reluctance to award a

defendant attorneys' fees in any civil rights case, especially in an employment discrimination case, because of the danger of discouraging persons with valid claims from pursuing them, the court finds that this case is one of those few troubling cases in which civil rights defendants are entitled to receive attorneys fees from the plaintiff. This action could only have been pursued to harass the defendants, for it was clearly frivolous and without foundation from the outset.

The consideration relevant to computing a reasonable attorney's fee award have been set forth by the United States Court of Appeals for the Seventh Circuit in Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). The time spent by the attorney is not to be simply multiplied by a billing rate. The primary factors in the computation include not only the time reasonably spent on the case, but also the value of the attorney's work, given local legal fees, and his abilities, reputation and degree of success in the case. Also relevant is whether the attorney's efforts in this case precluded him from working on other legal matters. These factors are drawn from the sections of the Code of Professional Responsibility that describe how an attorney should determine the fee he may properly charge a client.

While defendants' requests for awards of costs and attorneys' fees will be granted, the court cannot at this time on the showings made by defendants, compute the proper amounts of such awards. Defendants will therefore be directed to file complete breakdowns of charges and time and such other material supporting the requests for attorneys' fees as is required by Waters v. Wisconsin Steel Works, supra. The amount of such awards will be set by further order of the court.

Copies of defendants' showings relating to attorneys' fees shall be served on plaintiff, and plaintiff shall have 10 days from the date of filing to respond or otherwise challenge the showings and fees set forth.

This memorandum of decision contains the court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

JUDGMENT ORDER

Accordingly, it is ordered that defendants' motion that plaintiff's claim regarding the March 3, 1975 transfer be, and it hereby is, granted and plaintiff's claim regarding the March 3, 1975 transfer is dismissed as against both defendants.

It is further ordered that defendants' motions filed in open court on the date of trial pursuant to Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the remaining portions of plaintiff's complaint are granted, and the remaining portions of plaintiff's complaint are dismissed in their entirety.

Defendants' requests for costs and attorneys' fees are granted. Defendants are directed to file complete statements of charges and affidavits in support of their request for attorneys' fees in a manner consistent with that set out in Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976).

Accordingly, judgment is entered on behalf of both defendants, Kunkle Valve Co., Inc., and International Union of Allied Industrial Workers of America, Local 507, AFL-CIO and against plaintiff, John Bugg, Jr.

It is ordered that defendant Local 507 shall have

and recover of and from plaintiff a sum representing its costs and attorneys' fees incurred in this action in an amount to be determined by further order of the court.

It is further ordered that defendant Kunkle Valve Co., Inc. shall have and recover of and from plaintiff a sum representing its costs and attorneys' fees incurred in this action in an amount to be determined by further order of this court.

Entered this 23rd day of May, 1980.

James McClure Clarke
United States District Judge

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FILLENWARTH & FILLENWARTH
ATTORNEYS-AT-LAW
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SUITE E6A
6919 E. 10TH ST.
INDIANAPOLIS, INDIANA

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IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

FILED
MAY 16 1978
RICHARD E. TIMMONS, CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

JOHN BUGG, JR.,

Plaintiff,

V.

INTERNATIONAL UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA LOCAL 507, AFL-CIO, ET AL.,

Defendants.

CIVIL NO. F 78-7

MEMORANDUM OF DECISION AND ORDER

This pro se employment discrimination action is before the court on the defendants' various motions to dismiss. For the reasons set forth below, the motions will be granted in part and denied in part.

Plaintiff filed this pro se action on January 13, 1978, utilizing a form complaint provided to him by the clerk's office. The action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. This court's jurisdiction is also based upon the provisions of that statute. By his complaint, plaintiff contends that both defendants have discriminated against him in the terms and conditions of his employment because of his race, i.e., black. Plaintiff contends the discriminatory acts consisted of "Failure to promote, downgrading, denial of a ten-minute rest period, and failure to honor seniority." Attached to his complaint are copies of the right to sue letters issued October 19, 1977, by the Equal Employment Opportunity Commission (EEOC) against each of the defendants. Also attached to the form

complaint are copies of the charges he filed with the EEOC against the defendants. The February 3, 1976, and February 27, 1976, charges name both defendants and are apparently identical in substance. They cover plaintiff's allegations concerning failure to promote, failure to honor seniority and downgrading. The May 26, 1976, charge names only the defendant corporation and covers the allegation concerning denial of a ten-minute rest period.

The defendants first argue that this court has no jurisdiction over the subject matter of plaintiff's claims because he failed to satisfy the mandatory filing requirements which are jurisdictional prerequisites to maintaining a suit under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Both defendants join in the motion to dismiss the action in its entirety for plaintiff's alleged failure to file a timely charge with the EEOC and for plaintiff's alleged failure to file any charge with the Indiana Civil Rights Commission. Alternatively, the defendant union moves to dismiss, as to it, that portion of plaintiff's claims based upon the May 26, 1976, charge, i.e., denial of a ten-minute rest period, for plaintiff's failure to name the union in that charge. The motion to dismiss the action in its entirety will be denied. The motion of the defendant union to dismiss, as to it, the May 26, 1976, allegations will be granted.

In support of their motion to dismiss the action in its entirety for plaintiff's alleged failure to timely file with the EEOC or to file at all with the Indiana Civil Rights Commission, the defendants make the following arguments. First, they refer to paragraph five of plaintiff's complaint where he alleges that the last discriminatory act occurred on February 1, 1975. Then they refer to his earliest EEOC charge which is dated February 2, 1976.

Citing 42 U.S.C. §2000e-5(e), they contend that the maximum filing period, i.e., 300 days after the last allegedly discriminatory act, has not been satisfied and that plaintiff's claims must therefore be time barred. First, the court notes that as to those charges filed in February 1976, both EEOC charge forms state, on their face, that the last discriminatory act occurred in September 1975. Even assuming that the acts occurred on September 1, 1975, plaintiff's February filings were within 180 days, as required by the statute. 42 U.S.C. §2000e-5(e). Furthermore, as to the charge filed May 26, 1976, the EEOC charge form shows that the allegedly discriminatory act occurred on May 12, 1976. Certainly this filing was within the required time frame.

Defendants also argue that plaintiff's claims are defective in that he did not file, as required, with the Indiana Civil Rights Commission. While defendants are correct that the record does not reflect such a filing, the court finds that it must, in light of the nature of the instant motions, rely upon the implicit findings of both timeliness and proper state referral which are, by necessity, contained in the EEOC's issuance of a right to sue letter. Defendants correctly argue that the court is not conclusively bound by such findings of the EEOC. However, such findings, implicit though they may be, are entitled to sufficient weight to overcome the instant motions to dismiss at least until the defendants offer affirmative evidence establishing the court's lack of jurisdiction. Cf. Weise v. Syracuse University, 522 F.2d 397 (2nd Cir. 1975); Gautam v. First National City Bank, 425 F.Supp 579 (S.D. N.Y. 1976). In relying upon the implicit findings of the EEOC, the court is also mindful of the EEOC's general policy of deferring charges filed with it to the appropriate state agency, if any, until that agency has had an opportunity to consider the

charge. Of course, in denying the instant motions to dismiss, the court does not in any way preclude the defendants from presenting any subsequent motions they find appropriate on this issue if additional information is provided in support of such motions.

As to the defendant union's motion to dismiss, as to it, that portion of plaintiff's claim based upon the May 26, 1976, EEOC charge, the court will grant the motion. The defendant correctly argues that it was not named in that charge. It is a well-established jurisdictional prerequisite that a party sued under the provisions of Title VII must have first been named in the EEOC charge of discrimination. See Williams v. General Foods Corporation, 492 F.2d 399 (7th Cir. 1974). Thus, the defendant union's motion to dismiss the May 26, 1976, claim as it relates to the defendant union for lack of jurisdiction over the subject matter will be granted.

The defendant union also asserts that dismissal of the entire action, as to it, is warranted because of plaintiff's failure to exhaust internal union remedies allegedly available to him. There is no merit to this contention. Plaintiff is not required to exhaust his contractual remedies prior to bringing a Title VII based action. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974).

The defendant corporation also moves to dismiss the action in its entirety for failure to state a claim upon which relief can be granted. Defendant corporation's argument in this regard is based upon plaintiff's alleged failure to satisfy the pleading requirements of Rule 8, Federal Rules of Civil Procedure.

The court notes first that the proper motion is not one pursuant to Rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted but, rather, a motion pursuant to Rule 12(e) for a more definite statement. In any event, the court finds plaintiff's allegations in the instant action to be sufficient to withstand either motion. Therefore, defendant corporation's motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted will be denied.

ORDER

Accordingly, the defendant union's motion to dismiss, as to it, that portion of plaintiff's claims based on the May 26, 1976, EEOC charge of discrimination is granted, and that claim is dismissed as to the defendant union. The defendant corporation's and the defendant union's motions are in all other respects denied.

Entered this 18th day of May, 1978.

United States District Judge

Civ 32
(7-63)

312

JUDGMENT ON DECISION BY THE COURT

FILED

MAY 23 1980

RICHARD E. TURNER, CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

United States District Court

FOR THE NORTHERN DISTRICT OF INDIANA FORT WAYNE DIVISION

CIVIL ACTION FILE NO. F 78 - 7

JOHN BUGG, JR.

vs.

INTERNATIONAL UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA LOCAL 507, AFL-CIO, and, KUNKLE VALVE COMPANY

JUDGMENT

This action came on for trial (hearings) before the Court, Honorable Jesse E. Eschbach, United States District Judge, presiding, and the issues having been duly tried (~~before~~) and a decision having been duly rendered.

It is Ordered and Adjudged defendants' motion that plaintiff's claim regarding the March 3, 1975 transfer be, and it hereby is, granted and plaintiff's claim regarding the March 3, 1975 transfer is dismissed as against both defendants. It is further ordered that defendants' motions filed in open court on the date of trial pursuant to Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the remaining portions of plaintiff's complaint are granted, and the remaining portions of plaintiff's complaint are dismissed in their entirety.

Defendants' requests for costs and attorneys' fees are granted. Defendants are directed to file complete statements of charges and affidavits in support of their request for attorneys' fees in a manner consistent with that set out in Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997(1976).

ACCORDINGLY, judgment is entered on behalf of both defendants, Kunkle Valve Co., Inc., and International Union of Allied Industrial Workers of Amer-ca, Local 507, AFL-CIO and against plaintiff John Bugg, Jr.

It is ordered that defendant Local 507 shall have and recover of and from plaintiff a sum representing its costs and attorneys' fees incurred in this action in an amount to be determined by further order of the court.

It is further ordered that defendant Kunkle Valve Co.,Inc. shall have and recover of and from plaintiff a sum representing its costs and attorneys' fees incurred in this action in an amount to be determined by further order of this court.

Dated at Fort Wayne, Indiana, this 23rd day of May, 19 80.

Richard E. Turner
Clerk of Court

Copy to:
John Bugg, Jr.
Paul S. Mannweiler
Richard M. Blaich/Richard E. Fox
Richard G. McCracken
Thomas S. Locke

U.S. DISTRICT COURT
NORTHERN DISTRICT
OF INDIANA

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

JOHN BUGG, JR., Plaintiff,	)	
V.	)	CIVIL NO. F 78-7
INTERNATIONAL UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 507, AFL-CIO, ET AL., Defendants.	)	

ORDER

On June 18, 1981, the plaintiff herein, whose cause is now on appeal, filed the following motion:

MOTION TO CORRECT
OR MODIFY THE RECORD

Pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure and Rule 4(a1) of the Circuit Rules, the Plaintiff, John Bugg, Jr., moves the Court to correct or modify the record on the basis of the following:

1. The testimony contained in the Deposition of John Bugg, Jr., taken on behalf of the Defendant, Kunkle Valve Company, Inc., on 2/01/80.
2. Referral letters from the Office of Federal Contract Compliance Programs.
3. Correspondence from the personnel manager of the Defendant, Kunkle Valve Company, Inc., to the Fort Wayne Metropolitan Human Relations Commission.

In Item 1, the deposition of John Bugg was filed in this court on February 28, 1980 and was sent to the United States Court of Appeals as a supplemental record on April 14,

1981. However, that was defendant's discovery deposition of the plaintiff, and there is nothing in the record of this trial that such deposition was ever made a part of the record in this cause. As to Items 2 and 3 above, those items were never offered into the evidence in this cause. At trial, the plaintiff offered 24 exhibits, each of which was admitted by the court. The defendant's exhibits E, H, and I were offered and admitted by the court. Neither Item 2 nor 3, as designated in plaintiff's motion, was offered or admitted by either side.

Accordingly, the motion to correct or modify the record is denied.

Entered this 19th day of June, 1981.

United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CAUSE NO. 80-1909

JOHN BUGG, JR., Plaintiff-Appellant vs. INTERNATIONAL UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA LOCAL 507, AFL-CIO and KUNKLE VALVE COMPANY, INC. Defendants-Appellees	Appeal from the United States District Court for the Northern District of India..a, Fort Wayne Division --- Honorable Jesse E. Eschbach, Presiding Judge

NOTICE OF APPEAL

1. Parties taking the appeal: Plaintiff-Appellant, John Bugg, Jr..

2. Judgment or part thereof appealed from: Submitted 2/03/82- Decided 2/18/82, before Pell, Bauer, and Posner, Circuit Judges.

3. Statute under which the appeal is taken: 28 U.S.C. 2101.

PROOF OF SERVICE

I certify that on the 15. day of May 1982, service of a true and complete copy of the above foregoing pleading was made upon each party or attorney of record herein by depositing the same [illegible] in the United States mail in envelopes properly addressed to each of them and with sufficient first class postage affixed.

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particularly disturbing example of lax pleading, for it threatens to trivialize what we repeatedly have recognized as a *constitutional* requirement of Article III standing. See, *e. g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, —— U. S. ——, —— (1982); *Warth*, *supra*, 422 U. S., at 498.

In any event, in the context of this case, as it reaches us after some four years of confusing and profitless litigation, it is not within our province to order a dismissal. I therefore join the Opinion of the Court.

EVERETTE G. ALLEN, JR., Richmond, Va. (JAMES F. PASCAL, LINDA L. ROYSTER, and HIRSCHLER, FLEISCHER, WEINBERG, COX & ALLEN, with him on the brief) for petitioners; VANESSA RUIZ, Washington, D.C. (DANIEL M. SINGER, ARTHUR LAZARUS, JR., JAMES B. BLINKOFF, FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN, BETH LABSON-FREEMAN, GEORGE R. KEYS, JR., JAMES F. STUTTS, and McSWEENEY, STUTTS & BURTCH, with her on the brief) for respondents.

Nos. 78-1545 AND 80-951

ANNE B. ZIPES, ET AL., PETITIONERS
78-1545 *v.*
TRANS WORLD AIRLINES, INC.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, PETITIONER
80-951 *v.*
TRANS WORLD AIRLINES, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Syllabus

No. 78-1545. Argued December 2, 1981—Decided* February 24, 1982

In 1970, the union then representing flight attendants employed by respondent Trans World Airlines, Inc. (TWA), brought a federal-court class action alleging that TWA practiced unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 by its policy of grounding all female flight attendants who became mothers while their male counterparts who became fathers were permitted to continue flying. Subsequently, individual members of the class (petitioners in No. 78-1545) were appointed as class representatives to replace the bargaining agent, which was found to be an inadequate representative. The District Court later denied TWA's motion to exclude class members who had not filed charges with the Equal Employment Opportunity Commission (EEOC) within the time limit specified in Title VII, holding that while such filing requirement is a jurisdictional prerequisite not subject to waiver, any violation by TWA continued against all the class members until TWA changed its challenged policy. The court also granted the plaintiff class' motion for summary judgment on the issue of TWA's liability for violating Title VII. The Court of Appeals affirmed the grant of summary judgment and held that timely filing of EEOC charges was a jurisdictional prerequisite, but declined to extend the "continuing violation" theory so as to include in the plaintiff class those terminated employees who failed to file timely EEOC charges. However, the court stayed its mandate pending the filing of petitions in this Court, which, in turn, deferred consideration of the petitions pending completion of settlement proceedings in the District Court. In such proceedings, the District Court designated two subclasses: Subclass A, consisting of women who were terminated on or after March 20, 1970, and those who were discharged earlier but who had accepted reinstatement in ground positions, and Subclass B, consisting of all other members of the class, whose claims the Court of Appeals had found to be jurisdictionally barred for failure to satisfy the timely filing requiring. The flight attendants' current union (petitioner in No. 80-951) was permitted to intervene and object to the proposed settlement. On the basis of the Court of Appeals' stay of its mandate in its jurisdictional decision, the District Court rejected the union's challenge to its jurisdiction over Subclass B. It also approved the settlement and awarded restoration of retroactive seniority. The Court of Appeals affirmed, rejecting the union's contention that, because of the Court of Appeals' earlier opinion, the District Court lacked jurisdiction to approve the settlement or to order retroactive seniority with respect to Subclass B.

Held:

1. Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. The structure of Title VII, the congressional policy underlying it, and the reasoning of this Court's prior cases all lead to this conclusion.

2. The District Court had authority to award retroactive seniority to the members of Subclass B as well as Subclass A.

(a) The union's contention in No. 80-951 that there was no finding of discrimination with respect to Subclass B, and thus no predicate for relief under § 706(g) of Title VII is without merit. The District Court found unlawful discrimination against the plaintiff class as a whole, at a time when the class had not yet been divided into the two subclasses, and the court's summary judgment ran in favor of the entire class. Since the Court of Appeals erred in ruling that the District Court had no jurisdiction over claims by those who had not met the filing requirement and that those individuals should have been excluded from the class prior to the grant of summary judgment, there was no jurisdictional barrier to the District Court's finding of discrimination with respect to the entire class.

(b) Equally meritless is the union's contention that retroactive seniority contrary to the collective-bargaining agreement should not be awarded over the objection of a union that has not itself been found guilty of discrimination. Class-based seniority relief for identifiable victims of illegal discrimination is a form of relief generally appropriate under § 706(g). And, as made clear in *Teamsters* v. *United States*, 431 U. S. 324, once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated.

No. 78-1545, 582 F. 2d 1142, reversed; No. 80-951, 630 F. 2d 1164, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, and in Parts I and II of which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment in part, in which BURGER, C. J., and REHNQUIST, J., joined. STEVENS, J., took no part in the consideration or decision of the cases.

JUSTICE WHITE delivered the opinion of the Court.

The primary question in these cases is whether the statutory time limit for filing charges under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, (1970 ed.) is a jurisdictional prerequisite to a suit in the District Court. Secondarily, we resolve a dispute as to whether retroactive seniority was a proper remedy in this Title VII case.

I

In 1970, the Air Line Stewards and Stewardesses Association (ALSSA), then the collective bargaining agent of Trans World Airlines (TWA) flight attendants, brought a class action alleging that TWA practiced unlawful sex discrimination in violation of Title VII by its policy of grounding all female flight cabin attendants who became mothers, while their male counterparts who became fathers were permitted to continue flying. After collective bargaining eliminated the challenged practice prospectively, the parties in the case reached a tentative settlement. The settlement, which provided neither backpay nor retroactive seniority, was approved by the District Court. The Court of Appeals for the Seventh Circuit, however, found the union to be an inadequate representative of the class because of the inherent conflict between the interests of current and former employees. It remanded the case with instructions that the District Court name individual members of the class to replace ALSSA as the class repre-

*Together with No. 80-951, *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc., et al.*, also on certiorari to the same court.

sentative.[1] *Air Line Stewards and Stewardesses Assn. v. American Airlines Inc.*, 490 F. 2d 636 (CA7 1973).

Upon remand, petitioners in No. 78-1545 were appointed as class representatives. TWA moved to amend its answer to assert that the claims of plaintiffs and other class members were barred by Title VII's "statute of limitations" because they had failed to file charges with the Equal Employment Opportunity Commission (EEOC) within the statutory time limit. 1 App. 89a.[2] Although the District Court granted the motion to amend, it noted that the "delay in pleading the defense of limitations may well ultimately constitute a waiver of the defense." 1 App. 101a.

Subsequently, on October 15, 1976, the District Court denied TWA's motion to exclude class members who had not filed timely charges with the EEOC. In support of its motion, TWA argued that instead of an affirmative defense analogous to a statute of limitations, timely filing with the EEOC is a jurisdictional prerequisite not subject to waiver by any action of the defendants. While the District Court agreed that the filing requirements of Title VII are jurisdictional, it denied the motion on the basis that any violation by the airline continued against all the class members until the airline changed the challenged policy. 1 App. 131a–132a. On October 18, 1976, the District Court granted the motion of the plaintiff class for summary judgment on the issue of TWA's liability for violating Title VII. 1 App. 133a–134a.

The Court of Appeals affirmed the order of October 18, 1976, granting summary judgment on liability, expressly holding that "TWA's no motherhood policy . . . provides a clear example of the discrimination prohibited by §2000e–2(a)." *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142, 1145 (CA7 1978). It declined, however, "to extend the continuing violation theory, as did the district court, so as to include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges." *Id.*, at 1149.

The Court of Appeals went on to hold that timely filing of EEOC charges was a jurisdictional prerequisite. Because TWA could not waive the timely filing requirement, the Court of Appeals found that approximately 92% of the plaintiffs' claims were jurisdictionally barred by the failure of those plaintifffs to have filed charges of discrimination with the EEOC within 90 days the alleged unlawful employment practice. The Court of Appeals, however, stayed its mandate pending the filing of petitions in this Court. Petitions for certiorari were filed by the plaintiff class, No. 78–1545, and by TWA, No. 78–1549. This Court granted a motion to defer consideration of the petitions pending completion of settlement proceedings in the District Court.

In connection with the settlement proceedings, the District Court designated two subclasses. Subclass A, consisting of some 30 women, comprised those who were terminated on or after March 2, 1970, as well as those who were discharged earlier, but who had accepted reinstatement in ground duty positions. Subclass B, numbering some 400 women, covered all other members of the class and consisted of those whose claims the Court of Appeals had found to be jurisdictionally barred for failure to satisfy the timely filing requirement. 2 App. 3.

The proposed settlement divided three million dollars between the two groups. It also provided each class member with full company and union seniority from the date of termination. The agreement specified that "in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA."[3] App. to Pet. for Cert. in No. 80–951, p. 29a.

The Independent Federation of Flight Attendents (union), which had replaced ALSSA as the collective bargaining agent for the flight attendants, was permitted to intervene and to object to the settlement. On the basis that the Court of Appeals had not issued the mandate in its jurisdictional decision, the District Court rejected the union's challenge to its jurisdiction over Subclass B. App. to Pet. for Cert. in No. 80–951, pp. 14a–15a. After holding three days of hearings, the District Court approved the settlement and awarded competitive seniority. It explicitly found that full restoration of retroactive seniority would not have an unusual adverse impact upon currently employed flight attendants in any way atypical of Title VII cases. App. to Pet. for Cert. in No. 80–951, pp. 18a–19a.

The union appealed. It argued that, because of the Court of Appeals' earlier opinion, the District Court lacked jurisdiction to approve the settlement or to order retroactive seniority with respect to Subclass B. The Court of Appeals affirmed, reasoning that "the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action." *Air Line Stewards and Stewardesses Assn. v. Trans World Airlines*, 630 F. 2d 1164, 1169 (CA7 1980). It further explained that the question of jurisdiction as to Subclass B had not been finally determined because a challenge to its decision was pending before this Court and observed that the Courts of Appeals were split on the issue. The Court of Appeals noted that the District Court clearly had subject matter jurisdiction over the claims of Subclass A. It concluded, "Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval." *Ibid.*

The Court of Appeals also affirmed the award of seniority. According to the court, the settlement served the public policy of remedying past acts of sex discrimination and the consequences of those past acts. Moreover, "[t]he right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects." *Ibid.*[4]

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[1] The class was defined as all female flight cabin attendants who were terminated from employment with TWA on or after July 2, 1965, for reasons of pregnancy. The Court of Appeals assumed the class to include only those who would have resumed flight duty after becoming mothers but for TWA's policy. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142, 1147, and n. 9 (CA7 1978). The class thus included both former employees and current employees, that is, both those who declined and those who accepted ground positions.

[2] When suit was filed, 42 U. S. C. §2000e–5(d) (1970 ed.) required charges to be filed within 90 days of the alleged unlawful employment practice. In 1972, this provision was amended to extend the time limit to 180 days and is now codified as §2000e–5(e).

[3] Section 706(g) of Title VII, 78 Stat. 253, as amended, 42 U. S. C. §2000e–5(g) (1976 ed) provides:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate. . . ."

[4] The Court of Appeals relied on language in *Franks v. Bowman Trans-*

The union petitioned for certiorari, No. 80-951. We granted its petition together with the petitions in No. 78-1545 and No. 78-1549, —— U. S. ——, but later removed the TWA case, No. 78-1549,[1] from the argument docket and limited the grant in No. 80-951. —— U. S. ——.

II

The single question in No. 78-1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit in federal court or whether the requirement is subject to waiver and estoppel. In reaching its decision that the requirement is jurisdictional, the Court of Appeals for the Seventh Circuit relied on its reading of the statutory language, the absence of any indication to the contrary in the legislative history, and references in several of our cases to the 90-day filing requirement as "jurisdictional."[4] Other Courts of Appeals that have examined the same materials have reached the opposite conclusion.[5]

We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.[6] The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.

The provision granting district courts jurisdiction under Title VII, 42 U. S. C. § 2000e-5(e) and (f) does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC.[7] It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the the district courts.[8] The legislative history of the filing provision is sparse, but Senator Humphrey did characterize the time period for filing a claim as a "period of limitations," 110 Cong. Rec. 12723, and Senator Case described its purpose as preventing the pressing of "stale" claims, 110 Cong. Rec. 7243, the end served by a statute of limitations.

Although subsequent legislative history is not dispositive, see *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 596 (1980); *Cannon* v. *University of Chicago*, 441 U. S. 677, 686 n. 7 (1979), the legislative history of the 1972 amendments also indicates that Congress intended the filing period to operate as a statute of limitations instead of a jurisdictional requirement. In the Final Conference Committee section-by-section analysis of H. R. 1745, The Equal Opportunity Act of 1972, 118 Cong. Rec. 7166, 7167, the Committee not only termed the filing period a "time limitation," but explained:

> "This subsection as amended provides that charges be filed within 180 days of the alleged unlawful employment practice. Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection."[9]

This result is entirely consistent with prior case law. Although our cases contain scattered references to the timely filing requirement as jurisdictional, the legal character of the requirement was not at issue in those cases, and as or more often in the same or other cases, we have referred to the provision as a limitations statute.[10]

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portation Co., 424 U. S. 747, 779, n. 41 (1976):

"[D]istrict courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point: and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases."

[1] In No. 78-1549, TWA contends (a) that the Court of Appeals erred in affirming summary judgment for plaintiffs on the issue of liability, (b) that TWA should be required to grant only prospective relief to plaintiffs, and (c) that the Court of Appeals erred in defining the subclass of plaintiffs who had filed timely charges with the EEOC. In view of our decision in No. 78-1545 and No. 80-951, we now dismiss the petition in No. 78-1549 as improvidently granted.

[4] See *Electrical Workers* v. *Robbins & Myers*, 429 U. S. 229, 240 (1976); *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, 555, n. 4 (1977); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798 (1973).

[5] See *Carlile* v. *South Routt School District Re 3-J*, 652 F. 2d 981 (CA10 1981); *Coke* v. *General Adjustment Bureau, Inc.*, 640 F. 2d 584 (CA5 1981); *Leake* v. *University of Cincinnati*, 605 F. 2d 255 (CA6 1979); *Hart* v. *J.T. Baker Chemical Co.*, 598 F. 2d 829 (CA3 1979); *Laffey* v. *Northwest Airlines, Inc.*, 567 F. 2d 429 (CADC 1976).

[6] One of the questions on which we granted certiorari in No. 80-951 was whether the Court of Appeals erred in affirming the District Court's approval of the settlment of jurisdictionally barred claims. In reaching its decision, the Court of Appeals for the Seventh Circuit explicitly declined to follow *McArthur* v. *Southern Airway*, 569 F. 2d 276 (CA5 1978) (en banc). *Airlines Stewards and Stewardesses Assn.* v. *TWA*, 630 F. 2d, at 1168-1169. In *McArthur*, the Court of Appeals for the Fifth Circuit reversed the approval of a settlement agreement in a Title VII class action, holding that the District Court lacked jurisdiction because no plaintiff had filed a timely charge of discrimination with the EEOC. Because of our holding in No. 78-1545 that timely filing with the EEOC is not a jurisdictional prerequisite, this issue need not be resolved.

[7] 42 U. S. C. § 2000e-5(f)(3), for example, reads:

"Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. . . ."

[8] Section 2000e-5(e), the amended version of the filing provision, reads simply: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . ."

[9] The Senate Labor Comittee's Section by Section analysis of the Amendments explained that "[t]his subsection would permit . . . a limitation period similar to that contained in the Labor-Management Relations Act, as amended." S. Rep. No. 415, 92d Cong., 1st Sess. 36-37 (1971). We have recognized that the National Labor Relations Act was "the model for Title VII's remedial provisons," *Teamsters* v. *United States*, 431 U. S. 324, 366 (1977). Because the time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a statute of limitations subject to recognized equitable doctrines and not as a restriction of the jurisdiction of the National Labor Relations Board, see *NLRB* v. *Local 264, Laborers' Int'l Union*, 529 F. 2d 778, 781-785 (CA8 1976); *Shumate* v. *NLRB*, 452 F. 2d 717, 720 (CA4 1971); *NLRB* v. *A. E. Nettleton Co.*, 241 F. 2d 130, 133 (CA2 1957); *NLRB* v. *Itasca Cotton Mfg. Co.*, 179 F. 2d 504, 506-507 (CA5 1950), the time limitations under Title VII should be treated likewise.

Moreover, when Congress in 1978 revised the filing requirement of the Age Discrimination in Employment Act of 1967, 81 Stat. 607, 29 U. S. C. §§ 621 *et seq.*, which was modeled after Title VII, see *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979), the House Conference report explicitly stated that "the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act." House Conference Report No. 950, 95th Cong., 2d Sess., at 12, reprinted in 1978 U. S. Code Cong & Admin. News 504, 534 (footnote omitted).

[10] As the Court of Appeals for the Fifth Circuit points out in its opinion in *Coke*, 640 F. 2d, at 588-589, references to the filing requirement as a statute of limitations have come to dominate in our opinions:

"The trend of the Supreme Court cases is also significant. In the early cases, the Court in dicta referred to such time provisions using the label

More weighty inferences however, are to be drawn from other cases. *Franks* v. *Bowman Transportation Co., Inc.*, 424 U. S. 747 (1976), was a Title VII suit against an employer and a union." The District Court denied relief for unnamed class members on the ground that those individuals had not filed administrative charges under the provisions of Title VII and that relief for them was thus not appropriate. The Court of Appeals did not disturb this ruling, but we reversed, saying,

> "The District Court stated two reasons for its denial of seniority relief for the unnamed class members. The first was that those individuals had not filed administrative charges under the provision of Title VII with the Equal Employment Opportunity Commission and therefore class relief of this sort was not appropriate. We rejected this justification for denial of class-based relief in the context of backpay awards in *Albemarle Paper*, [422 U. S. 405 (1975),] and . . . reject it here. This justification for denying class-based relief in Title VII suits has been unanimously rejected by the courts of appeals, and Congress ratified that construction by the 1972 amendments. . . ." 424 U. S., at 771 [footnote omitted].

If the timely filing requirement were to limit the jurisdiction of the District Court to those claimants who have filed timely charges with the EEOC, the District Courts in *Franks* and *Albemarle* would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them seniority. We did not so hold. Furthermore, we noted that Congress had approved the Court of Appeals cases that awarded relief to class members who had not exhausted administrative remedies before the EEOC. It is evident that in doing so, Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the District Court.

In *Love* v. *Pullman Co.*, 404 U. S. 522 (1972), we announced a guiding principle for construing the provisions of Title VII. Declining to read literally another filing provision of Title VII, we explained that a technical reading would be "particularly inappropriate in a statuory scheme in which laymen, unassisted by trained lawyers, initiate the process." 404 U. S., at 527. That principle must be applied here as well.

The reasoning of other cases assumes that the filing requirement is not jurisdictional. In *Electrical Workers* v. *Robbins & Myers*, 429 U. S. 229 (1976), we rejected the argument that the timely filing requirement should be tolled because the plaintiff had been pursuing a grievance procedure set up in the collective bargaining agreement. We did not reach this decision on the basis that the 180 day period was jurisdictional. Instead, we considered the merits of a series of arguments that grievance procedures should toll the requirement. Such reasoning would have been gratuitous if the filing requirement were a jurisdictional prerequisite."

Similarly, we did not *sua sponte* dismiss the action in *Mohasco Corp.* v. *Silver*, 447 U. S. 807 (1980) on the basis that the district court lacked jurisdiction because of plaintiff's failure to comply with a related Title VII time provision. Instead, we merely observed in a footnote that "[p]etitioner did not assert respondent's failure to file the action within 90 days as a defense." 447 U. S., at 811, n. 9.

By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

We therefore reverse the Court of Appeals in No. 78-1545.

III

In No. 80-951, the union challenges on several grounds the District Court's authority to award, over the union's objection, retroactive seniority to the members of Subclass B. We have already rejected the union's first contention, namely, the District Court had no jurisdiction to award relief to those who had not complied with Title VII's filing requirement. The union also contends that in any event there has been no finding of discrimination with respect to Subclass B members and that the predicate for relief under § 706(g) is therefore missing. This contention is also without merit.

The District Court unquestionably found an unlawful discrimination against the plaintiff class, and the class at that time had not been subdivided into Subclasses A and B. Summary judgment ran in favor of the entire class, including both those members who had filed timely charges and those who had not. The Court of Appeals affirmed the summary judgment order as well as the finding of a discriminatory employment practice. The court went on, however, to hold that the District Court had no jurisdiction over claims by those who had not met the filing requirement and that those individuals should have been excluded from the class prior to the grant of summary judgment. But as we have now held, that ruling is erroneous. The District Court did have jurisdiction over non-filing class members. Thus, there was no jurisdictional barrier to its finding of discrimination with respect to the entire class. With the reversal of the Court of Appeals judgment in No. 78-1545 and our dismissal of No. 78-1549, which had challenged the affirmance of the summary judgment order, the order that found class-wide discrimination remains intact and is final. The award of retroactive seniority to members of Subclass B as well as Subclass A is not infirm for want of a finding of a discriminatory employment practice.

Equally meritless is the union's contention that retroactive seniority contrary to the collective bargaining agreement should not be awarded over the objection of a union that has not itself been found guilty of discrimination. In *Franks* v. *Bowman*, 424 U. S. 747, 764 (1976), we read the legislative history of Title VII as giving

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'jurisdictional prerequisite.' *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 . . . (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 . . . (1974). In the 1976 *Robbins & Myers* decision the jurisdictional label was used once, but there were numerous references to 'tolling the limitations period,' 429 U. S. at 239, . . . and other labels obviously referring to a statute of limitations, as opposed to subject matter jurisdiction. See also *United Air Lines* v. *Evans*, 431 U. S. 553, . . . (1977), in which both labels are used. From and after late 1977, all nine justices have concurred in opinions containing dicta using the limitations label to the exclusion of the jurisdictional label. *Occidental Life Insurance Company* v. *EEOC*, 432 U. S. 355, 371–372. . . . (1977); *United Air Lines, Inc.* v. *McDonald*, 432 U. S. 385, 391–391 . . . (1980); *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 818–823. . . . (1980), *Delaware State College* v. *Ricks*, —— U. S. ——, . . . (1980)."

"In *Robbins & Myers*, we also held that the expanded 180 "limitations period," enacted by the 1972 amendments, was retroactive. 429 U. S. at 244. This holding presupposes that the requirement is not jurisdictional. Moreover, in reaching this conclusion, we quoted from *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 315–316 (1945): "[C]ertainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment." Several circuit courts have read *Robbins & Myers* as implicitly approving equitable tolling. *Coke* v. *General Board of Adjustment*, 640 F. 2d 584, 588 (CA5 1981); *Hart* v. *J. T. Baker Chemical Co.*, 598 F. 2d 829, 833 (CA3 1979); *Smith* v. *American President Lines, Ltd.*, 571 F. 2d 102, 108–109 (CA2 1978).

"emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole in so far as possible the victims of . . . discrimination . . . ."

While recognizing that back pay was the only remedy specifically mentioned in the provision, we reasoned that adequate relief might be denied without a seniority remedy. We concluded that the class-based seniority relief for identifiable victims of illegal discrimination is a form of relief generally appropriate under § 706(g).

In *Franks*, the District Court had found both that the employer had engaged in discrimination and that the discriminatory practices were perpetuated in the collective bargaining agreements with the unions. 424 U. S., at 751. *Teamsters* v. *United States*, 431 U. S. 324 (1977), however, makes it clear that once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. In *Teamsters*, the parties agreed to a decree which provided that the District Court would decide "whether any discriminatees should be awarded additional equitable relief such as retroactive seniority." 431 U. S., at 331, n. 4. Although we held that the union had not violated Title VII by agreeing to and maintaining the seniority system, we nonetheless directed the union to remain in the litigation as a defendant so that full relief could be awarded the victims of the employers post-act discrimination. 431 U. S., at 356, n. 43.[*] Here, as in *Teamsters*, the settlement left to the District Court the final decision as to retroactive seniority.

In resolving the seniority issue, the District Court gave the union all the process that was due it under Title VII in our cases. The union was allowed to intervene. The District Court heard its objections, made appropriate findings, and determined that retroactive seniority should be awarded. The Court of Appeals agreed with that determination, and we have eliminated from our consideration here the question whether on the facts of this case the Court of Appeals and the District Court were in error in this respect.

Accordingly, the judgment in 78–1545 is reversed and the judgment in 80–951 is affirmed.

So ordered.

JUSTICE STEVENS took no part in the consideration or decision of these cases.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in No. 78–1545 and concurring in the judgment in No. 80–951.

The above cases arise out of the same protracted controversy, and the Court disposes of them in a single opinion. The only question in No. 78–1545 is whether the timely filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit. I agree that timely filing is not jurisdictional and is subject to waiver and estoppel. Accordingly, I join parts I and II of the Court's opinion.

I join only the judgment in No. 80–951. My concern with the Court's opinion is that it does not make clear that a timely charge, as well as a violation of Title VII, is a prerequisite to disturbing rights under a *bona fide* seniority system protected by § 703(h), 42 U. S. C. § 2000e–2(h).[1] This was made clear in *United Airlines, Inc.* v. *Evans*, 431 U. S. 553, 559 (1977), a case not discussed in the Court's opinion.[2] I nevertheless concur in the remand of No. 80–951, in which a settlement agreement was approved awarding retroactive competitive-status seniority under the standard of *Franks* v. *Bowman*, 424 U. S. 747 (1976). This case has been in litigation since 1970, and in view of its complexity it is difficult to be certain as to "what happened and when." I believe, however, that one can conclude that the requirements of *Evans* were met.

As noted in the Court's opinion, *ante*, at ——, the District Court's order finding class-wide discrimination is now final. The District Court also entered an order finding that timely charges had been filed for all class members, and that order is similarly final. The timely-charge order was entered on October 15, 1976, three days before the entry of the order finding class-wide discrimination. These orders were consolidated on appeal to the Court of Appeals for the Seventh Circuit. Although the October 18th order, finding discrimination, was affirmed, the Court of Appeals vacated the other order, holding that the members of Subclass B had failed to meet the jurisdictional requirements of Title VII because they had not filed timely claims. No district court order was ever actually vacated because, on the motion of the parties, the Court of Appeals stayed its mandate, and the parties then reached a settlement. Today, the Court reverses that portion of the Court of Appeals' judgment that would have vacated the October 15th order. As a result, both the October 15th and October 18th orders, finding timely charges and class-wide discrimination, are now final. I therefore concur in the judgment of the Court affirming the award of retroactive competitive-status seniority under the standard of *Franks* v. *Bowman*.[3]

A. RAYMOND RANDOLPH, JR., Washington, D.C. (SHARP, RANDOLPH & GREEN, ARAM A. HARTUNIAN, ARNOLD I. SHURE, and KEVIN M. FORDE, with him on the brief) for petitioner in No. 78-1545; LAURENCE A. CARTON, Chicago, Ill. (GARDNER, CARTON & DOUGLAS, and JAMES A. VELDE, with him on the brief) for respondents in No. 78-1545; WILLIAM A. JOLLEY, Kansas City, Mo. (STEVEN A. FEHR and SCOTT A. RAISHER, with him on the brief) for petitioners in No. 80-951; LAURENCE A. CARTON, Chicago, Ill. (GARDNER, CARTON & DOUGLAS, and JAMES A. VELDE, with him on the brief) for respondents in No. 80-951.

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[*] In noting that the union in *Teamsters* properly remained a defendant in the litigation, we cited to Fed. Rule Civ. Proc. 19(a). The union in this case was not joined under Rule 19 when individuals replaced the union as class representatives, but intervened later. *Cf. EEOC* v. *MacMillan Doedel Containers, Inc.*, 503 F. 2d 1086, 1095 (CA6 1974) (joinder under Rule 19(a) provides union with full opportunity to participate in the litigation and the formulation of proposed relief, although as practical matter union not play role in litigation until court finds violation of Title VII).

[1] In *Franks* v. *Bowman*, 424 U. S. 747 (1976), timely charges of discrimination had been filed. Relief was awarded on the theory that current employees were merely being placed in the position they would have enjoyed, relative to the victims, had no discrimination ever taken place. In contrast, when the victims of discrimination have slept on their rights, it will often be unfair to award them full retroactive seniority at the expense of employees who may have accrued their present seniority in good faith. When timely charges have not been filed, a District Court should consider these equities in determining whether to award competitive-status seniority, and the presence of a settlement between the employer and the plaintiffs should not affect the balancing of these equities. Under any other rule, employers will be able to settle Title VII actions, in part, by bargaining away the rights of current employees.

[2] The Court cites *United Air Lines* v. *Evans* twice, see notes 6 and 12 *ante*, at —— and ——; both references are to terms used by the *Evans* Court in describing the timely-filing requirement.

[3] I am not entirely content with this formalistic resolution of the "timely filing" issue. But, after almost 12 years of litigation, neither the parties nor the courts have addressed specifically whether the failure to file timely charges should affect the balance of the equities in awarding competitive-status seniority. Rather than prolong this disruptive litigation, it may well be in the best interest of all of the parties to approve the settlement—as the Court's judgment does today.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
46 EAST OHIO STREET, ROOM 456
INDIANAPOLIS, INDIANA 46204

TELEPHONE: 269-7212

In Reply, Refer To: DIN

December 6, 1979

Mr. John Bugg
817 Woodview Blvd.
Ft. Wayne, In. 46806

Dear Mr. Bugg:

Thank you for your letter regarding your employer's failure to post the Equal Employment Opportunity Poster. I have placed your letter on file for future use.. Your cooperation is appreciated. Copy of the subject poster will be sent to the employer you mention for immediate posting.

Sincerely,

W. Howard
Compliance Mgr.

U.S. DEPARTMENT OF EMPLOYMENT STANDARDS
Office of Federal Contract
Washington, D. C. 20

John Bugg
213 E. Lewis St., Apt. 2
Ft. Wayne, Indiana 46803

...T OF DISCRIMINATION
...MENT UNDER
...VERNMENT CONTRACTS

INSTRUCTIONS: Only complaints of discrimi... ...king under Government contracts are filed on this form. The act of discrimination must be based on RACE, COLO..., ..., S..., or NATIONAL ORIGIN, and the complaint must be filed within 180 days of the discriminatory act. Other types of discrimination are not handled by this office. Fill in the form, making one copy for yourself and one official copy. The official copy of the form must be typed or printed legibly and signed by you.

002720 C-04778

YOUR NAME	TELEPHONE NO.	SOCIAL SECURITY NO.
John Bugg Jr.	495093	198-38-2710
STREET ADDRESS	**CITY**	**STATE** / **ZIP CODE**
1213 E. LEWIS St., #APT. 2	FT. WAYNE	INDIANA / 46803

RECEIVED OCT 3 1975 OFFICE OF FEDERAL CONTRACT COMPLIANCE

MAIL THIS FORM TO:

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF FEDERAL CONTRACT COMPLIANCE
WASHINGTON, D. C. 20210

NAME, ADDRESS & ZIP CODE OF THE COMPANY INVOLVED
AUTOMATIC VALVE CO., INC.
8222 BLUFFTON RD.
FT. WAYNE, INDIANA 46809

FOR WHICH GOVERNMENT AGENCY IS THE COMPANY UNDER CONTRACT? U.S. NAVY.

GIVE THE EXACT DATE OF THIS DISCRIMINATION
3/11/75 & 9/2/75, etc.

DISCRIMINATION FOR
- [X] RACE OR COLOR
- [ ] RELIGION
- [ ] SEX
- [ ] NATIONAL ORIGIN

WHAT DID IT INVOLVE? (Check only the most apparent factor)
- [ ] HIRING
- [ ] PROMOTION
- [ ] DOWNGRADING
- [ ] LAYOFF OR RECALL
- [X] TRANSFER
- [ ] JOB ASSIGNMENT
- [ ] EMPLOYEE BENEFITS
- [ ] WAGES
- [ ] SEGREGATED FACILITIES
- [ ] DISCHARGE
- [ ] TRAINING OR APPRENTICESHIP
- [ ] OTHER (Explain below)

THE COMPLAINT: *Tell the full story of this act of discrimination. Show all dates, places, and the names and titles of persons involved.*

MARCH 1, 1975, I WAS TRANSFERRED FROM THE NEW BRITAIN TO A DEBURRING MACHINE + SUBSEQUENT TRANSFERS IN VIOLATION OF CONTRACT, WITHOUT THE BENEFIT OF THE "BIDDING CLAUSE."

ALSO I HAVE BEEN CHARGED 5 TIMES THE STATED PENALTY FOR TARDINESS, SINCE THE START OF EMPLOYMENT (10/3/74) THESE INFRACTIONS HAVE OCCURRED AT AUTOMATIC VALVE DEPT. 10. AND INITIATED BY RALPH NESING, PERSONNEL DIRECTOR.

THE UNION STEWARD, JAMES WATSON, HAS GIVEN VERBAL APPROVAL TO THESE ACTIONS, IGNORING SENIORITY. LATEST TRANSFER 9/2/75

☐ Continued on the other side.

Form CC-1
Dec. 1974

THE COMPLAINT *(Continued from page one)*

Additional pages may be attached to this form. Please put your name and S.S. No. at the top of each page.

I certify that the information given above is true and correct to the best of my knowledge or belief. (A willful false statement is punishable by law: U.S. Code, Title 18, Sec. 1001)

YOUR SIGNATURE

DATE 9/29/75

DO NOT WRITE BELOW THIS LINE

The complainant has reaffirmed this complaint in my presence.
This complaint is now the basis of an investigation under EXECUTIVE ORDER 11246 and/or EXECUTIVE ORDER 11375.

NAME OF INVESTIGATOR	TITLE	SIGNATURE
AGENCY OR DEPARTMENT CONDUCTING INVESTIGATION		DATE INVESTIGATION STARTED

GPO 888-128

BEFORE THE METROPOLITAN)
HUMAN RELATIONS COMMISSION)

COMPLAINT
E-519

JB 43

Complainant			Respondent		
Name	Address	Phone	Name	Address	Phone
John Bragg	1613 E. Pine Fort Wayne, Ind	1139-5193	Trundle Valve Inc.	7444 E Dupont Rd. Fort Wayne, Ind	747-5342

Alleged Violation: Employment; Sex ___, Race X, Color ___, Religion ___, National Origin ___, Ancestry ___.

Date of Alleged Violation: Feb-4'75 Continuous.

Facts:

I, John Bragg do hereby state and affirm that I have been discriminated against in the following fashion.

I was transfered unjustly by the General foreman. I was given a pay raise when I was transfered from one job to another.

I make this complaint before Metropolitan Human Relation Commission because of the discrimination. My Race is Negro.

I have not commenced any action, civil or criminal, based upon the grievance set forth above, except:

John Bragg
Signature of Complainant

STATE OF INDIANA
COUNTY OF Allen

Undersigned, being duly sworn, deposes and says: that.... he/she is the complainant herein:... he/she has read the foregoing complaint and knows the contents thereof; that the same is true of his/her own knowledge except to matters therein stated on information and belief; that as to those matters.... he/she believes same to be true.

John Bragg
Signature of Complainant

Subscribed and sworn to before me this 26 day of Aug 1975

10/24/79
My Commission Expires

John Michael Beams
NOTARY PUBLIC

PLAINTIFF'S EXHIBIT NO. 12 NOT ADM

STAFF INVESTIGATION

DATE Oct 19, 1976 . CASE NUMBER E-519 / TM 6-1174

1. Caption: John Buss VS Rumble Valve, Inc.

2. A. Investigator: John H. Beams

B. Recommendation: Probable Cause

3. A. Date Filed: August 26, 1975 .

B. Allegation: racial discrimination in area of employment .

C. Date of alleged violation: February , 1975 , and continuing

4. A. Charge: (1) C/p hired in as trainee, set-up and operate, New Britain machine. U. contract says you start as "trainee A", after 3 months, move to "B", then 3 months later, to "Set up and Operate". I remained at "A" until removed and made a "floater" on March 3, 197 I allege the removal was discriminatory.

Also allege the failure to advance to Trainee B was discriminatory

(2) While a floater, I occasionally was used as a painter, without being paid at the higher rate, as provided in the contract.

(3) C/p bid into trainee position for "Goss" machine, May 19, 1975. Alleges that his performance was good, but on July 14, 1975, was put back to deburring. Was denied an equal opportunity to advance because of race. "Deburring" was done as a "floater" again, as there were then no job classifications open to the complainant.

(4) While a floater again, c/p was used as a painter without being paid at the higher classification.

(5) Finally, Respondent placed c/p into classification of janiter. He alleges that this position, for which no one bid, should have been filled by a person of lesser seniority.

(6) C/p was laid off during the summer for the plant-wide vacation shut-down. He alleges it was due to his race that he was denied the pay.

(7) Cp alleges that he has had deductions on his pay check for being late to work and further alleges that other employees who commit the same late infraction are not penalized in the same manner as his. Cp alleges that he has not been allowed breaktime while other employees are afforded the time.

B. Answer:

(1) Resp. acknowledges that c/p worked past the 3-month period as "A", but alleges that it arraged an extension of training with the union. C/p was removed because he was not learning the set-up operations well enough.

(2) Respondent acknowledges there were times when, under the contract, cp should have been paid 2¢ more per hour when he was used as a painter. Resp. agrees to pay him the difference. Respondent denies any racial motive, alleging that this happens occasionally to everyone. (over)

I.B. (answer) continued:

(3) Respondent states that c/p again failed to grasp the machinist training, that he scrapped an inordinant number of pieces, and that, on two occasions, he operated the Goss machine without any material in it, causing extensive damage to the tooling.

(5) see (2) above

(5) Complainant did not have any classification when the janiter job opened. He was being maintained on the payroll until he could be fit into a classification. Several jobs had been posted prior to this, for which he did not bid. He was not qualified to assume any job held by the five persons of less seniority, and as such, had no right to bump them.

(6) Company is required to lay off all persons during vacation shut-down, without pay, during their first year of employment, pursuant to the union contract. This policy was applied to all persons then employed who had less than a year's service.

(7) · (Answer) Rp states that all employees who are tardy receive the same penalty as cp, per the Union contract, art. xii, sec. 2-b. Rp further states that art. ix, sec.5-c specifies how breaktime is to be taken by employees.

FACT	SOURCE
Re #1, Removal from New Brittain Machine. Re #3 Removal from Goss. In both instances, the foreman was Sam Boyd, the "trainer" was Ed Shaff, and the inspector was Harold Scheele. "Mr. Fancher" was General Foreman on first shift, and was responsible for c/p from 3-4 pm. while c/p was on the Goss. The chief union steward was Jim Matson.	

1. REASONS FOR REMOVING C/P

A. Boyd stated that the set-up man always had to set up the machines for c/p. Ed Shaff said c/p "Never learned the first thing about setting up," and that he had no initiative learning the job.

Boyd said he was very slow, and uncooperative--he looks at you like he's daring you to make him follow an order.

Scheele stated that his workmanship was poor even on those pieces which were not scrapped, and that he scrapped a tremendously high quantity of pieces; that, on more than one occasion, he had to order that c/p's machine be shut down, because he was running a series of scrap.

B. If c/p was so bad, why did he stay on the New Britain for five months, and why did he not progress to trainee B?

We kept trying, because of affirmative action obligation, because he was black (Messing). Matson felt they kept him on rather than firing him because of his race.

Respondent has never before kept an employee beyond three months as a Trainee A. Messing says that the union and company agreed to extend his Trainee A status, rather than take him off machine or promote him to trainee B. C/p received a payroll check in the sum of $131.25 marked "Hourly pay rate in error adjustment on prior pay Nov. 7, 1974-Feb.1975". Ralph Messing spent several days trying to find out why this check was issued, but could not find the answer. C/p believes it was backpay for not being promoted to Trainee B after third month per the Union Contract, but the pay differential is only 5¢ per hour, and his tenure as Trainee B on the New Britain would only have run during Jan & February.

Messing says Chief Steward Matson was present when agreement was made to extend Trainee A period. No documentation of this meeting. Matson made no reference to it, but did state, when asked, that c/p should have received the 5¢ raise after three months.

C. Re charge #3: REMOVAL FROM GOSS MACHINE, July, 1975.

Boyd stated that one night he observed that it took four hours to move a little tool 1/1000's.

General allegations were made, as above, about poor workmanship and high levels of scrap.

Handwritten notes (Exhibit A) from Sam Boyd, marked 6/9/75:

"Subject John Bugg cant do anything right has two many wrecks destroyies two many tools Can't set tools when shown how the only thing left to do Is get him off machine"

One note written by Fancher (see attachment) describes three separate problems with set-up work, on May 28, 30, and 31, respectively.

Mr. Messing stated that, on two separate occasions (one of which is listed above) c/p operated the Goss without placing the piece to be worked, thus ruining several hundred dollars worth of tooling. No documentation was kept on this. C/P denies that it occurred. One machinist, Joe Zoey, stated that this is not an uncommon occurence, and that it has happened to him on more than one occasion.

462

Re #2 and 4:
There were some occasions when c/p worked more than two hours on a higher rated job while being paid at the lower "floater" rate.
This was due, in part, to c/p's failure to turn in time sheets, the failure of management to keep good records and inform c/p of this duty. No evidence of racial motive, directly.
This pay rate was in violation of union contr.

Respondent will pay c/p $1.59 for 79.7 hours worked at 2¢ less than scale, and $ .64 for 8 hours worked at 8¢ less.

. August 30, 1976 response to investigat letter, pg 5. (Last Page) Ralph Messing; personnel mgr.

EXHIBIT A, CONTRACT, P 11(

Resp. letter of Ag 30, '76 and phone conv., Ralph Messing

Re # 5

Between his removal from Goss machine and placement as janitor, c/p had chance to bid on nine (9) job openings. He did not bid on any. He was placed on the ninth, the janitor job.
The company has a right to place people in any way it deems fit, when no one bids for a job, so long as it does not violate another provision of the agreement
Bugg had no right under the contract to bump anyone of less seniority, as all were holding classifications he'd never held, and the right to bump and later qualify applies only when there is reduction in force ART. VII Sec.10 p 12.

COPIES OF BID SHEETS

U. Contract. ART.XXIX (f) p35.

See Resp Ag 30 '76 letter answer 6(a), for list of less sen. men and their jo

Ralph Messing, pers. mgr
Jim Matson, Chief Steward

Re #6:
c/p was laid off without pay during the first two weeks of July, 1975
Union contract does not provide for vacation pay during the first year
All persons of all races with less seniority than c/p were also not paid during said period. (Walker, Waters, Parrish, Rodriquez, Cottrell)

c/p, respondent

ARTICLE XII (1975) (p 28)

Payroll register, 20/6/75

D. COUNTERVAILING FACTORS

Complainant states that at no time was any feedback given to him concerning his performance or failures to perform. He was "flabbergasted" when told he was being removed from Goss. Ed Shaff confirmed that he personally never specifically told complainant he was not performing, that he felt that people know when they are not making it, without you having to make a point of it. Boyd stated that c/p was given feedback, but did not identify any particular occasion or form.
Bouey, a machinist, said successful training depends in great part on how you get along with your supervisors, interpersonally.

E. POTENTIAL MANAGEMENT RACISM

Investigator interviewed all the management personnel involved in the decisions to remove c/p from the New Britain and the Goss. Also interviewed five black employees who were disinterested in this case (Irvin, Bouey, Carter, Davis, Parks) as well as two whites whose names were suggested by the above blacks as persons who might identify racism in the supervision (Klaynot, Swygart).
All those who had any knowledge of Boyd, Shaff, Fancher or Messing stated as follows:
Re Boyd: Davis believes he is racially prejudiced
Davis and Parks noted that he doesn't like Bugg
Swygart stated that he is "guilty of prejudicial attitudes", judging from off-the-cuff comments made to Swygart(white) about certain black employees, by Boyd

Re Klaynot: Bouey, Carter and Parks felt he was "ok," that he had conscientiously represented all persons regardless of race.

Re Shaff: Bouey, Carter and Davis felt he was "ok"; had never gotten prejudice "vibes" from Shaff. Swygart said his racial prejudice was less apparent than that of Boyd, but that he had heard him make occasion pejorative racial "slips".
Re Fancher: He was "ok" or "fair" (Carter, Davis, Parks)
If he didn't like you, you wouldn't make it (Bouey)

Re Bugg: Takes a little longer, but gets job done (Bouey)
Stares into space, guilty of inattention (Swygart)
Have seen him sleepy, negligent, wreck a machine due to gross negligence (Klaynot)

F. REPORT ON PRODUCTIVITY

Investigator studied statistics from production records. Plant-wide production in Work Center #1 (where both Goss and New Britain located) from Aug- Dec, 1975; C/p's perfdtance in Jan, 1975 (New Britain) compared to Rodriguez in Nov. 197. (New Britain) (Rod. trained on the machine for five month period; the comparison was in the fourth month for each); C/p, May and June perf. on Goss:

SCRAP: Bugg(New Britain, Jan.): 1.70* per hour
Plant-wide: .17 per hour
Rodriguez: .07 per hour

Bugg (Goss, May-June): .297* per hour
*Bugg states he quotes them figures unless we present the forms he signed each day acknowledging the scraps

HOURS WORKED DIVIDED BY GOOD PIECES PRODUCED:

Bugg (New Britain, Jan.): .021* hours per piece produced.
Plant-wide: .031
Rodriguez (New Britain) .013
Bugg(Goss)(May-June) .011

*Note: C/p states he produced twice as many pieces as the New Britain operators on 1st or 3rd Shift.

G. Plant Statistics (see attached)

Re: #7

1. Union contract specifies the amount of tardiness allowed before an employee would be docketed in pay. Said clause is summarized in this manner: employees may be tardy 1/10 of an hr or any portion of an hour to the maximum of 8 times per each yr of the contract. In essence it means that an employee is afforded to be late 8 times during a year before any pay deductions for same.
Ralph Hessing explained to investigator the system used in computing late time. The system is similar to the one used by the "Service" which is computed in hundredth of an hour. ei: 1/10th of an hour equals 6 min.
Investigator did a random sample for the following period: 8/75;11/76;1/77 on three different shifts; different jobs,two weeks of time cards for the above mentioned period/
Investigator found that employees are being penalized in their pay when they exceed the 8 "free" tardiness allowed per the contract.
Hessing stated to investigator that time is closely watched so that employees do not exceed the allowance.
2. Regarding breaktime:Cp had received a 3 day disciplinary for refusing to work during his break. Cp was at that time a chip puller which is a job that requires the removal of nails which is being discarded from the machine and fall into a bin. Foreman had asked cp to clean the bin, but cp refused because it was his break time. However, the machine operator needed the bin cleaned and run said machine. Hessing stated to investigator that the machine operator did not have a break at that time since the operator runs the machine on a continuous basis, and that cp could have taken his break at a more convenient time.
Plant rules which which were applied to cp state that first offense o.n the insubordination warrants 3 days off, 2nd offense discharge.

Personal Interv. w/Hessing(Re Article XII - sec. 2/b ;

See Synplex Time Recorder sub mitted by Hessing.

See copies of time cards

See payroll/attendance copies of employees.

write up - 5/12/76 - 3 day disciplinary.

Hessing supplied investigator with data regarding disciplinary actions: Spanish male-insubordination - 3 days off (May 5,6,7/1976);
cp (bk/male)- insubordination - 3 days off (May 13,14,17/1976);
cp (" ") - unsatisfactory work -(cp delayed production) - 3 days off(Jan.25-27,19
Spanish male - excessive absentee(29 work days . - 3 days off(3/1-3/3 & 2/28,197
white male- excessive absentee - (24 work days) 3 days off(6/20-22,1977)
Hessing submitted the above to investigator. The above are the only discipline he could find for

fact G source C

1976-present. Messing stated there were none for 1975.

Regarding breaktime: contract specifies that machine operators are to take a combination of 10 min.rest period &2 five min. wash up to make up the lunch period for those operating machines since they are paid for this 20 min. lunch. However, those not operating machines are to punch out during their lunch break of 30 min.

see Union contract- Art. 17,sec 7,8,9

Messing informed investigator that cp had been warned several times about break time procedure or its use (cp had left the loss machine-operator-unauthorized break). Investigator discussed this with cp, to which cp stated that he was not aware of break interpretation, nor how did Rp computed the time on tardiness. Cp raised questions regarding where breaks may be taken. Rp related that those being paid during their lunch time would not punch out,would eat on the premises and take their breaks(getting a cup of coffee, etc) right at the machine. In comparison to other employees which are allowed to go across the street to get something to eat. Cp also questioned if the parking lot was also Rp's premises. Messing stated to investigator that it was.

see Interview with Messing/Bugg (cp)

6. Attach any chart, exhibit, analysis, legal opinion, news clipping, article, or narrative which will elucidate the investigation, or support your recommendation.

7. Legal authority. Cite and discuss or explain, if necessary, any cases which support your recommendation on these facts.

READY FOR PROBABLE CAUSE

Approval of Case Control Specialist

Approval of Staff Attorney

DATE APPROVED

Mr John Bugg was hired in as a machine operator under the trainee program. He was given a long period of time to qualify but just did enough on as a machine operator. He run the tools into several pairs of chuck jaws which had to be replaced. He burnt up one motor cause he did take his foot off the pedal. He was not able to put together a set up after a long period of time on the job. The machine was just more than he could handle with no previous experience.

By the contract we should have left him go. Instead I put him in the deburring dept. Till something else opened up. At this time he had no classification. He was called a floater. In August a machine opened up in 2nd shift with no bidders a new man which is the chip puller asked for this job, since Mr Bugg was floating with no classification it was then put on this job. He was transfered per the contract.

This job still is a lower rate classification than the one he was on so this could not be for race going to this job.

Per the contract Kwik Valu Company holds with international Union, allied Industrial workers of America AFL-CIO Local 507 I see no charge of discriminating against this man.

Kelly Manning

Copy & copy furnished to Jo Bugg at his request 3 Sept 80 dcs

302

JAN 21 1976

OFCC File No. C-04778

Mr. John Bugg, Jr.
1213 East Lewis Street, Apt. #2
Fort Wayne, Indiana 46803

Dear Mr. Bugg:

This Office has received your letter of complaint.

The Office of Federal Contract Compliance Programs administers the implementation of Executive Order 11246, as amended, which prohibits discrimination in employment by Federal contractors or subcontractors on the basis of race, color, religion, sex, or national origin.

The Equal Employment Opportunity Commission (EEOC) administers Title VII of the Civil Rights Act of 1964, as amended, which also prohibits such discrimination and its coverage includes labor organizations, employment agencies, employers of 15 persons or more, and State and local Governments.

The Department of Labor has signed a Memorandum of Understanding with the Equal Employment Opportunity Commission which provides that the Commission investigate individual complaints of discrimination covered by both Executive Order 11246, as amended, and Title VII.

Since your complaint appears to involve discrimination within our jurisdiction, we have referred it to the EEOC for investigation. You can expect to hear from the EEOC. If you have any further information or questions concerning your complaint, please contact the EEOC directly at:

Mr. Osma D. Spurlock, Director
Indianapolis District Office - EEOC -
Federal Building - U.S. Courthouse
46 East Ohio Street - Rm. 456
Indianapolis, Indiana 46204

Sincerely,

[illegible]

DORIS D. WOOTEN
Acting Director

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

JOHN BUGG, JR.,

Plaintiff,

VS.

CIVIL NO. F-78-7

INTERNATIONAL UNION OF ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 507, AFL-CIO AND KUNKLE VALVE CO., INC.,

Defendant

ANSWERS TO REQUEST
FOR INFORMATION

The following answers are given in response to your request for discovery dated January 24, 1980:

1. Photocopies of job transfer records, etc. for listed employees.

   Answer: Due to the number of documents involved, such documents will be made available for your review from 3:00 p.m. to 5:00 p.m. on January 30 and 31, 1980. Copies of these documents will be made at that time and at your expense if requested.

2. Photocopies of my employment file.

   Answer: Such file will be made available for your review under the same conditions outlined in answer 1 above.

3. Photocopies of "statement of duties and responsibilities" of all the job classifications that I have held since my date of hire.

   Answer: As you were informed in a response to your letter dated April 23, 1979, the only such statement which exists relates to "Janitor-Chip Puller-Stock Handler." An additional copy has been attached to these answers.

4. Photocopies of time cards for all qualified operators of the New Britain and Goss, etc.

Answer: Refer to answer #1.

5. Photocopies of the shop order forms for New Britain for the period 10/07/64 through 12/31/65.
Answer: Such records are not maintained by the Company for other than current orders.

6. Documentation of pay rate for employees to hold classification of trainee on New Britain and Goss.

Answer:	10/7/74 - 11/28/74	11/29/74 - 11/28/75	11/29/75 - 11/28/76
New Britain			
Trainee A	4.09	4.39	4.89
Trainee B	4.14	4.44	4.94
Goss			
Trainee A	4.09	4.39	4.89
Trainee B	4.14	4.44	4.94

7. State which employees receive the "ten minute" rest period and when they receive it?
Answer: Employees on a continuous 8 hour shift do not receive breaks or clean up time. Such employees are given a 30 minute paid lunch period. All other employees receive a ten minute break. During all periods prior to 1980, the break was designated as 9:00 a.m. to 9:10 a.m.

8. Photocopies of disciplinary forms for John Bugg.
Answer: Such documents are maintained in the employment file referred to in Answer 2.

9. Photocopies of scrap forms, etc.
Answer: All available scrap records will be made available under the conditions outlined in Answer 1. There is no reasonable method by which the Company can identify the individuals who took any particular vacancy created by your transfer.

10. The number of hours worked in production by John Bugg, etc.
Answer: Such information is contained within the records requested in number 4 above. Additionally, attached is a copy of a letter you have previously been provided, summarizing the requested information.

11. List of Supervisory personnel, etc.
Answer:

Sam Boyd - General Foreman - 2nd shift - 10/74 through 1979.

Jon Scott - Lead Man - 2nd shift - 10/74 to present.

Edgar Schaff - Lead Man - 2nd shift - 10/74 through 1979.

Ralph Sisco - Plant Sup. - 1st shift - 1975 through January 1977.

All documents which the Company has agreed to make available for your review are available through the personnel office - Mr. Ralph Mesing. If you desire to review these materials at times other than indicated above on January 30, 31, or February 1, 1980, please contact Mr. Mesing immediately. You may consider using any available personal or vacation time off for such purpose if you so elect.

Richard H. Blaich
Attorney for Kimble Valve Co., Inc.

protection review as something more than "a mere tautological recognition of the fact that Congress did what it intended to do." *Fritz, supra*, at — (STEVENS, J., concurring).

B

Neither the structure of § 1611 nor its legislative history identifies or even suggests any policy plausibly intended to be served by denying appellees the small SSI allowance. As noted above, the only purpose identified in the House and Senate Reports is the irrelevant goal of depriving inmates of penal institutions of all benefits. See n. 2, *supra*. The structure of the statute offers no guidance as to purpose because § 1611 (e) is drawn in reference to the policies of Medicaid rather than to the policies of SSI. By mechanically applying the criteria developed for Medicaid, Congress appears to have avoided considering what criteria would be appropriate for deciding in which public institutions a person can reside and still be eligible for some SSI payment. The importation of eligibility criteria from one statute to another creates significant risks that irrational distinctions will be made between equally needy people. See *U. S. D. A.* v. *Murry*, 413 U. S. 508, 514 (1973); *Medora* v. *Colautti*, 602 F. 2d 1149 (CA3 1979).

The Secretary argues, and the Court agrees, that the exclusion "is rationally related to the legitimate legislative desire to avoid spending federal resources on behalf of individuals whose care and treatment are being fully provided for by state and local government units." Brief for Appellant 27. The Secretary does not argue that appellees are not in present need of the comfort allowance; indeed, he concedes "that the statutory classification does not exclude appellees because they were thought to be less needy." *Id.*, at 32.[*] Nor does the Secretary suggest that because a State provides health care and the necessities of life to inmates of mental hospitals, the State also will provide the inmate with a comfort allowance. Indeed, the probability that a State will pay a patient a comfort allowance does not increase when the federal government refuses to relieve it of part of the cost of the patient's medical care. The Court apparently recognizes this, as it states that whether or not a State actually provides a comfort allowance is irrelevant. *Ante*, at 16; n. 20. Appellees simply are denied a benefit provided to other institutionalized, disabled patients.

But, it is argued, Congress rationally could make the judgment that the States should bear the responsibility for any comfort allowance, because they already have the responsibility for providing treatment and minimal care. There is no logical link, however, between these two responsibilities. See *U. S. D. A.* v. *Murry*, 413 U. S. 508 (1973). Residence in a public mental hospital is rationally related to whether the Congress should pay for the patient's treatment. *Legion* v. *Richardson*, 354 F. Supp. 456 (SDNY), aff'd, *sub nom. Legion* v. *Weinberger*, 414 U. S. 1058 (1973). The judgment whether the federal government should subsidize care for the mentally ill in large public institutions involves difficult questions of medical and economic policy. *Supra*, at —. But, residence in a *public mental* institution, as opposed to residence in a state *medical* hospital or a *private* mental hospital, bears no relation to any policy of the SSI program. The monthly $25 allowance pays for small personal expenses, beyond the minimal care and treatment provided by Medicaid or "other programs." H. R. Rep. No. 96-451 (Pt. 1), 96th Cong., 1st Sess., 153 (1979). If SSI pays a cash benefit relating to personal needs other than maintenance and medical care, it is irrelevant whether the State or the Federal Government is paying for the maintenance and medical care; the patients' need remains the same, the likelihood that the policies of SSI will be fulfilled remains the same.

I conclude that Congress had no rational reason for refusing to pay a comfort allowance to appellee, while paying it to numerous otherwise identically situated disabled indigents. This unexplained difference in treatment must have been a legislative oversight. I therefore dissent.

[*] This concession makes it difficult to accept the Court's conclusion that Congress rationally could have decided that "Medicaid recipients in public institutions . . . are the most needy and the most deserving of the small monthly supplement." *Ante*, at 18.

ELLIOTT SCHULDER, Assistant to the Solicitor General (WADE H. McCREE, JR., Solicitor General, and KENNETH S. GELLER, Deputy Solicitor General, with him on the brief) for appellant; JAMES D. WEILL, Chicago, Ill. (ROBERT E. LEHRER, DEBRA L. RASKIN, MARIANNE R. SMIGELSKIS, and THOMAS J. GRIPPANDO, with him on the brief) for appellees.

No. 79-1764

Texas Department of Community Affairs, Petitioner, v. Joyce Ann Burdine. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Syllabus

No. 79-1764. Argued December 9, 1980—Decided March 4, 1981

Respondent filed suit in Federal District Court, alleging, *inter alia*, that her termination of employment with petitioner was predicated on gender discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court found that the testimony for petitioner sufficiently had rebutted respondent's allegation of gender discrimination in the decision to terminate her employment. The Court of Appeals reversed this finding, holding that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate, nondiscriminatory reasons for the employment action and also must prove by objective evidence that those hired were better qualified that the plaintiff, and that the testimony for petitioner did not carry either of these burdens.

Held: When the plaintiff in a Title VII case has proved a prima facie case of employment discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions.

(a) As set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, the basic allocation of burdens and order of presentation of proof in a Title VII case, is as follows. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. The defendant need not persuade the court that it was actually motivated by the proffered reasons, but it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

(b) The Court of Appeals erred by requiring petitioner to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating respondent. By doing this, the court required much more than is required by *McDonnell Douglas*, *supra*, and its progeny: it placed on petitioner the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the respondent. Limiting the defendant's evidentiary obligation to a burden of production will not unduly hinder the plaintiff.

(c) The Court of Appeals also erred in requiring petitioner to prove by objective evidence that the person hired was more qualified than

respondent. It is the plaintiff's task to demonstrate that similarly situated employees were not treated equally, but the Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected, and if it cannot, a court would, in effect, conclude that it has discriminated. The Court of Appeals' views can also be read as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. 608 F. 2d 563, vacated and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to address again the nature of the evidentiary burden placed upon the defendant in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The narrow question presented is whether, after the plaintiff has proved a prima facie case of discriminatory treatment, the burden shifts to the defendant to persuade the court by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the challenged employment action existed.

I

Petitioner, the Texas Department of Community Affairs (TDCA), hired respondent, a female, in January 1972, for the position of accounting clerk in the Public Service Careers Division (PSC). PSC provided training and employment opportunities in the public sector for unskilled workers. When hired, respondent possessed several years' experience in employment training. She was promoted to Field Services Coordinator in July 1972. Her supervisor resigned in November of that year, and respondent was assigned additional duties. Although she applied for the supervisor's position of Project Director, the position remained vacant for six months.

PSC was funded completely by the United States Department of Labor. The Department was seriously concerned about inefficiencies at PSC.[1] In February, 1973, the Department notified the Executive Director of TDCA, B. R. Fuller, that it would terminate PSC the following month. TDCA officials, assisted by respondent, persuaded the Department to continue funding the program, conditioned upon PSC reforming its operations. Among the agreed conditions were the appointment of a permanent Project Director and a complete reorganization of the PSC staff.[2]

After consulting with personnel within TDCA, Fuller hired a male from another division of the agency as Project Director. In reducing the PSC staff, he fired respondent along with two other employees, and retained another male, Walz, as the only professional employee in the division. It is undisputed that respondent had maintained her application for the position of Project Director and had requested to remain with TDCA. Respondent soon was rehired by TDCA and assigned to another division of the agency. She received the exact salary paid to the Project Director at PSC, and the subsequent promotions she has received have kept her salary and responsibility commensurate with what she would have received had she been appointed Project Director.

Respondent filed this suit in the United States District Court for the Western District of Texas. She alleged that the failure to promote and the subsequent decision to terminate her had been predicated on gender discrimination in violation of Title VII. After a bench trial, the District Court held that neither decision was based on gender discrimination. The court relied on the testimony of Fuller that the employment decisions necessitated by the commands of the Department of Labor were based on consultation among trusted advisors and a nondiscriminatory evaluation of the relative qualifications of the individuals involved. He testified that the three individuals terminated did not work well together, and that TDCA thought that eliminating this problem would improve PSC's efficiency. The court accepted this explanation as rational and, in effect, found no evidence that the decisions not to promote and to terminate respondent were prompted by gender discrimination.

The Court of Appeals for the Fifth Circuit reversed in part. 608 F. 2d 563 (1979). The court held that the District Court's "implicit evidentiary finding" that the male hired as Project Director was better qualified for that position than respondent was not clearly erroneous. Accordingly, the court affirmed the District Court's finding that respondent was not discriminated against when she was not promoted. The Court of Appeals, however, reversed the District Court's finding that Fuller's testimony sufficiently had rebutted respondent's prima facie case of gender discrimination in the decision to terminate her employment at PSC. The court reaffirmed its previously announced views that the defendant in a Title VII case bears the burden of proving by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for the employment action and that the defendant also must prove by objective evidence that those hired or promoted were better qualified than the plaintiff. The court found that Fuller's testimony did not carry either of these evidentiary burdens. It, therefore, reversed the judgment of the District Court and remanded the case for computation of backpay.[3] Because the decision of the Court of Appeals as to the burden of proof borne by the defendant conflicts with interpretations of our precedents adopted by other courts of appeals,[4] we granted certiorari — U. S. — (1980). We now vacate the Fifth Circuit's decision and remand for application of the correct standard.

II

In *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.[5] First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legiti-

[1] Among the problems identified were overstaffing, lack of fiscal control, poor bookkeeping, lack of communication among PSC staff, and the lack of a full-time project director. Letter of March 20, 1973 from Charles Johnson to B. R. Fuller, reprinted in App., at 35–40.

[2] See *id.*, at 39.

[3] The Court of Appeals also vacated the District Court's judgment that petitioner did not violate Title VII's equal pay provision, 42 U. S. C. § 2000e-2 (h), but that decision is not challenged here.

[4] See, *e. g., Lieberman* v. *Gant*, 630 F. 2d 60 (CA2 1980); *Jackson* v. *U. S. Steel Corp.*, 624 F. 2d 436 (CA3 1980); *Ambush* v. *Montgomery County Government*, 22 FEP Cases 1101 (CA4 1980); *Loeb* v. *Textron, Inc.*, 600 F. 2d 1003 (CA1 1979). But see *Vaughn* v. *Westinghouse Elec., Corp.*, 620 F. 2d 655 (CA5 1980), cert. pending, No. 80-276.

[5] We have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes. See *McDonnell Douglas*, *supra*, 411 U. S., at 802, n. 14; *Teamsters* v. *United States*, 431 U. S. 324, 335–336, and n. 15 (1977).

mate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Id.*, at 804.

The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff. See *Board of Trustees of Keene State College* v. *Sweeney*, 439 U. S. 24, 25, n. 2 (1979); *id.*, at 29 (STEVENS, J., dissenting). See generally 9 Wigmore, Evidence § 2489 (3d ed. 1940) (the burden of persuasion "never shifts"). The *McDonnell Douglas* division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question.

The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderence of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.[6] The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. See *Teamsters* v. *United States*, 431 U. S. 324, 358 & n. 44 (1977). As the Court explained in *Furnco Construction Co.* v. *Waters*, 438 U. S. 567, 577 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[7]

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See *Sweeney*, *supra*, at 25. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.[8] To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.[9] The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted,[10] and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See *McDonnell Douglas*, *supra*, at 804–805.

III

In reversing the judgment of the District Court that the discharge of respondent from PSC was unrelated to her sex, the Court of Appeals adhered to two rules it had developed to elaborate the defendant's burden of proof. First, the defendant must prove by a preponderence of the evidence that legitimate, nondiscriminatory reasons for the discharge existed. 608 F. 2d, at 567. See *Turner* v. *Texas Instruments, Inc.*, 555 F. 2d 1251, 1255 (CA5 1977). Second, to satisfy this burden, the defendant "must prove that those he hired . . . were somehow *better* qualified than was plaintiff; in other words, comparative evidence is needed." 608 F. 2d, at 567 (emphasis in original). See *East* v. *Romine, Inc.*, 518 F. 2d 332, 339–340 (CA5 1975).

A

The Court of Appeals has misconstrued the nature of the burden that *McDonnell Douglas* and its progeny place on the defendant. See Part II, *supra*. We stated in *Sweeney* that "the employer's burden is satisfied if he simply 'explains what

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[6] In *McDonnell Douglas*, *supra*, we described an appropriate model for a prima facie case of racial discrimination. The plaintiff must show: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualification, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U. S., at 802.

We added, however, that this standard is not inflexible, as "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations." *Id.*, at 802, n. 13.

In the instant case, it is not seriously contested that respondent has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male who had been under her supervision.

[7] The phrase "prima facie case" may denote not only the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

[8] This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law. "The word 'presumption' properly used refers only to a device for allocating the production burden." F. James & G. Hazard, Civil Procedure § 7.9, at 255 (2d ed. 1977) (footnote omitted). See Fed. Rule Evid. 301. See generally 9 Wigmore, Evidence § 2491 (3d Ed. 1940). Cf. J. Maguire, Evidence, Common Sense and Common Law, 185–186 (1947). Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

[9] An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel.

[10] See generally J. Thayer, Preliminary Treatise on Evidence 346 (1898). In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.

he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons.'" 439 U. S., at 25, n. 2, quoting *id.*, at 28, 29 (STEVENS, J., dissenting). It is plain that the Court of Appeals required much more: it placed on the defendant the burden of persuading the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff."

The Court of Appeals distinguished *Sweeney* on the ground that the case held only that the defendant did not have the burden of proving the absence of discriminatory intent. But this distinction slights the rationale of *Sweeney* and of our other cases. We have stated consistently that the employee's prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; that is, to satisfy this intermediate burden, the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. The Court of Appeals would require the defendant to introduce evidence which, in the absence of any evidence of pretext, would *persuade* the trier of fact that the employment action was lawful. This exceeds what properly can be demanded to satisfy a burden of production.

The court placed the burden of persuasion on the defendant apparently because it feared that "[i]f an employer need only *articulate*, not prove, a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions." *Turner* v. *Texas Instruments, Inc.*, *supra*, at 1255 (emphasis in original). We do not believe, however, that limiting the defendant's evidentiary obligation to a burden of production will unduly hinder the plaintiff. First, as noted above, the defendant's explanation of its legitimate reasons must be clear and reasonably specific. *Supra*, at 5 6. *See Loeb* v. *Textron, Inc.*, 600 F. 2d 1003, 1011-1012, n. 5 (CA1 1979). This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded "a full and fair opportunity" to demonstrate pretext. Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Third, the liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. See *EEOC* v. *Associated Dry Goods Corp.*, — U. S. — (1981). Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the *McDonnell Douglas* framework permits the plaintiff meriting relief to demonstrate intentional discrimination.

B

The Court of Appeals also erred in requiring the defendant to prove by objective evidence that the person hired or promoted was more qualified than the plaintiff. *McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally. 411 U. S., at 804. The Court of Appeals' rule would require the employer to show that the plaintiff's objective qualifications were inferior to those of the person selected. If it cannot, a court would, in effect, conclude that it has discriminated.

The court's procedural rule harbors a substantive error. Title VII prohibits all discrimination in employment based upon race, sex and national origin. "The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and . . . neutral employment and personnel decisions." *McDonnel Douglas*, *supra*, at 801. Title VII, however, does not demand that an employer give preferential treatment to minorities or women. 42 U. S. C. § 2000e-2 (j). See *Steelworkers* v. *Weber*, 443 U. S. 193, 205-206 (1979). The statute was not intended to "diminish traditional management prerogatives." *Id.*, at 207. It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired. *Furnco Construction Co.* v. *Waters*, 438 U. S., at 577-578.

The views of the Court of Appeals can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. But Title VII does not obligate an employer to accord this preference. Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination. *Loeb* v. *Textron, Inc.*, *supra*, at 1012, n. 6; see *Licberman* v. *Gant*, 630 F. 2d 60, 65 (CA2 1980).

IV

In summary, the Court of Appeals erred by requiring the defendant to prove by a preponderence of the evidence the existence of nondiscriminatory reasons for terminating the respondent and that the person retained in her stead had superior objective qualifications for the position." When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions. The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

GREGORY WILSON, Assistant Attorney General, State of Texas (MARK WHITE, Attorney General, JOHN W. FAINTER, JR., First Assistant Attorney General, RICHARD E. GRAY, III, Executive Assistant, PAUL R. GAVIA, Chief, State & County Affairs, and LONNY F. ZWIENER, Assistant Attorney General, with him on the brief) for petitioner; HUBERT L. GILL, Austin, Tex., for respondent.

"The court review the defendant's evidence and explained its deficiency:

"Defendant failed to introduce comparative factual data concerning Burdine and Walz. Fuller merely testified that he discharged and retained personnel in the spring shakeup at TDCA primarily on the recommendations of subordinates and that he considered Walz qualified for the position he was retained to do. Fuller failed to specify any objective criteria on which he based the decision to discharge Burdine and retain Walz. He stated only that the action was in the best interest of the program and that there had been some friction within the department that might be alleviated by Burdine's discharge. Nothing in the record indicates whether he examined Walz' ability to work well with others. This court in *Fox* found such unsubstantiated assertions of "qualification" and "prior work record" insufficient absent data that will allow a true comparison of the individuals hired and rejected." 608 F. 2d, at 568.

"Because the Court of Appeals applied the wrong legal standard to the evidence, we have no occasion to decide whether it erred in not reviewing the District Court's finding of no intentional discrimination under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52 (a). Addressing this issue in this case would be inappropriate because the District Court made no findings on the intermediate questions posed by *McDonnell Douglas*

In 1972, a new § 1104 (a)(3), 46 U. S. C. § 1274 (a)(3), was added to the Act. As originally proposed, the section provided that the agency could aid in financing repayment of "any amount of construction-differential subsidy paid with respect to a vessel pursuant to Title V of this Act . . . in order to release such vessel from all restrictions imposed as a result of the payment of [that] subsidy. . . ." [9] As enacted, the section did not include the language relating to release from all restrictions. The House Committee explained the deletion as follows:

> "In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of this Act. Your Committee has therefore amended the legislation by deleting the language [relating to release from all restrictions]. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act." [10]

The understanding of the 92d Congress seems clear. And while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 354, n. 39 (1977), such views are entitled to significant weight, *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974), and particularly so when the precise intent of the enacting Congress is obscure.

IV

In conclusion, we hold that the Act empowers the Secretary to approve full-repayment/permanent-release transactions of the type at issue here. We express no view upon respondents' claim that if such authority exists under the Act full repayment may not be made by promissory note. This issue was not addressed by the Court of Appeals and is open for its consideration on remand. Further, we express no view upon the merits of the Secretary's particular exercise of discretion with regard to the *Stuyvesant* since that issue is not before us.

Reversed and remanded.

WILLIAM E. McDANIELS, Washington, D.C. (JOHN W. VARDAMAN, JR., JANE E. GENSTER, WILLIAMS & CONNOLLY, NEAL M. MAYER, COLES & GOERTNER, JONATHAN BLACK, and PRESTON, THORGRIMSON, ELLIS, HOLMAN & FLETCHER, with him on the brief) for petitioners; and ANDREW J. LEVANDER, Assistant to the Solicitor General (WADE H. McCREE, JR., Solicitor General, ALICE DANIEL, Acting Assistant Attorney General, RONALD R. GLANCZ, and MICHAEL KIMMEL, Justice Department attorneys, and MICHAEL J. McMORROW, Assistant General Counsel, with him on the brief) for federal respondent supporting petitioners; AMY LOESERMAN KLEIN, Washington, D.C.; and STEPHEN N. SHULMAN, Washington, D.C. (FRANCES BALLARD, BALLARD, SPAHR, ANDRES & INGERSOLL, ALAN G. CHOATE, PEPPER, HAMILTON & SCHEETZ, WILLIAM KARAS, CHARLES FRIEDLANDER, SUZETTE MATTHEWS, GALLAND, KHARASCH, CALKINS & SHORT, JOSEPH A. ARTABANE, MARK C. ELLENBERG, and CADWALADER, WICKERSHAM & TAFT, with them on the brief) for respondents.

[9] H. R. 9756, 92d Cong., 1st Sess., § 3 (1971).

[10] H. R. Rep No. 72-688, 92d Cong., 1st Sess., 9-10 (1971).

No. 78-1548

California Brewers Association et al., Petitioners, v. Abram Bryant et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[February 20, 1980]

Syllabus

As an exception to the rule making it unlawful for an employer to engage in practices, procedures, or tests that operate to "freeze" the status quo of prior discriminatory employment practices, § 703 (h) of Title VII of the Civil Rights Act of 1964 provides that it shall not be an unlawful employment practice for an employer to apply different standards of compensation, terms, conditions, or privileges of employment pursuant to a bona fide seniority system if such differences are not the result of an intention to discriminate because of race. A multiemployer brewery industry collective-bargaining agreement accorded greater benefits, with respect to hiring and layoffs, to "permanent" than to "temporary" employees, and provided that a temporary employee must work at least 45 weeks in a single calendar year before he can become a permanent employee. Respondent Bryant (hereafter respondent), a Negro, brought a class action in District Court against petitioner association, petitioner employers, and several labor unions, alleging, *inter alia*, that the defendants had discriminated against him and other Negroes in violation of Title VII, and, in particular, that the agreement's 45-week requirement had operated to preclude him and the members of his class from achieving, or from a reasonable opportunity of achieving, permanent employee status. The District Court dismissed the complaint for failure to state a claim on which relief could be granted. The Court of Appeals reversed, holding that the 45-week requirement was not a "seniority system" or part of a "seniority system" within the meaning of § 703 (h), and accordingly remanded the case to the District Court to enable respondent to prove that such requirement has had a discriminatory impact on Negroes.

Held: The Court of Appeals erred in holding that the 45-week requirement is not a component of a "seniority system" within the meaning of § 703 (h). The fact that the system created by the agreement establishes two parallel seniority ladders, one allocating benefits due temporary employees and the other identifying the benefits owed permanent employees, does not prevent it from being a "seniority system" within the meaning of § 703 (h). The 45-week requirement, correspondingly, serves the needed function of establishing the threshold requirement for entry into the permanent employee seniority track. Cf. *Teamsters* v. *United States*, 431 U. S. 324. Unlike such criteria as educational standards, aptitude or physical tests, or standards that give effect to subjectivity, but like any "seniority" rule, the 45-week requirement focuses on length of employment. Moreover, the requirement does not distort the operation of the basic system established by the agreement, which rewards employment longevity with heightened benefits, since, as a general rule, the more seniority a temporary employee accumulates, the more likely it is that he will be able to satisfy the 45-week requirement.

585 F. 2d 421, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined. POWELL and STEVENS, JJ., took no part in the consideration or decision of the case.

MR. JUSTICE STEWART delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 [1] makes unlawful practices, procedures, or tests that "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430. To this rule, § 703 (h) of the Act, 42 U. S. C. § 2000e-2 (h) provides an exception:

> "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of

[1] 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

> employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race. . . ."

In *Teamsters* v. *United States*, 431 U. S. 324, 352, the Court held that "the unmistakable purpose of § 703 (h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII . . . even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes."[2]

The present case concerns the application of § 703 (h) to a particular clause in a California brewery industry collective-bargaining agreement. That agreement accords greater benefits to "permanent" than to "temporary" employees, and the clause in question provides that a temporary employee must work at least 45 weeks in a single calendar year before he can become a permanent employee. The Court of Appeals for the Ninth Circuit held that the 45-week requirement was not a "seniority system" or part of a "seniority system" within the meaning of § 703 (h). 585 F. 2d 421. We granted certiorari to consider the important question presented under Title VII of the Civil Rights Act of 1964. — U. S. —.

I

In 1973 the respondent, a Negro, filed a complaint in the United States District Court for the Northern District of California, on behalf of himself and other similarly situated Negroes, against the California Brewers Association and seven brewing companies (petitioners here), as well as against several unions. The complaint alleged that the defendants had discriminated against the respondent and other Negroes in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and in violation of 42 U. S. C. § 1981.[3]

The complaint, as amended, alleged that the respondent had been intermittently employed since May 1968, as a temporary employee of one of the defendants, the Falstaff Brewing Corporation. It charged that all the defendant employers had discriminated in the past against Negroes, that the unions had acted in concert with the employers in such discrimination, and that the unions had discriminated in referring applicants from hiring halls to the employers. The complaint further asserted that this historical discrimination was being perpetuated by the seniority and referral provisions of the collective-bargaining agreement (Agreement) that governed industrial relations at the plants of the seven defendant employers. In particular, the complaint alleged, the Agreement's requirement that a temporary employee work 45 weeks in the industry in a single calendar year to reach permanent status had, as a practical matter, operated to preclude the respondent and the members of his putative class from achieving, or from a reasonable opportunity of achieving, permanent employee status.[4] Finally, the complaint alleged that on at least one occasion one of the defendant unions had passed over the respondent in favor of more junior white workers in making referrals to job vacancies at a plant of one of the defendant employers.

The Agreement is a multi-employer collective-bargaining agreement negotiated more than 20 years ago, and thereafter updated, by the California Brewers Association (on behalf of the petitioner brewing companies) and the Teamsters Brewery and Soft Drink Workers Joint Board of California (on behalf of the defendant unions). The Agreement establishes several classes of employees and the respective rights of each with respect to hiring and layoffs. Three of these classes are pertinent here: "permanent," "temporary" and "new" employees.

A permanent employee is "any employee . . . who . . . has completed forty-five weeks of employment under this Agreement in one classification[5] in one calendar year as an employee of the brewing industry in [the State of California]." An employee who acquires permanent status retains that status unless he "is not employed under this Agreement for any consecutive period of two (2) years. . . ."[6] A temporary employee under the Agreement is "any person other than a permanent employee . . . who worked under this agreement . . . in the preceding calendar year for at least sixty (60) working days. . . ." A new employee is any employee who is not a permanent or temporary employee.

The rights of employees with respect to hiring and layoffs depend in substantial part on their status as permanent, temporary or new employees.[7] The Agreement requires that employees at a particular plant be laid off in the following order: new employees in reverse order of their seniority at the plant, temporary employees in reverse order of their plant seniority, and then permanent employees in reverse order of their plant seniority. Once laid off, employees are to be rehired in the reverse order from which they were laid off.

The Agreement also gives permanent employees special "bumping" rights. If a permanent employee is laid off at any plant subject to the Agreement, he may be dispatched by the union hiring hall to any other plant in the same local area with the right to replace the temporary or new employee with the lowest plant seniority at that plant.

Finally, the Agreement provides that each employer shall obtain employees through the local union hiring hall to fill needed vacancies. The hiring hall must dispatch laid-off workers to such an employer in the following order: first, employees of that employer in the order of their seniority with that employer; second, permanent employees registered in the area in order of their industry seniority; third, temporary employees in the order of their seniority in the industry; and fourth, new employees in the order of their industry seniority. The employer then "shall have full right of selection among" such employees.

The District Court granted the defendants' motions to dismiss the complaint for failure to state a claim on which relief could be granted. No opinion accompanied this order. A divided panel of the Court of Appeals reversed, 585 F. 2d 421, concluding that the 45-week rule is not a "seniority system" or part of a "seniority system" within the meaning of § 703 (h) of Title VII. In the appellate court's view the provision "lacks the fundamental component of such a system" which is "the concept that employment rights should

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[2] *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, extended this holding to preclude Title VII challenges to seniority systems that perpetuated the effects of discriminatory post-Act practices that had not been the subject of a timely complaint. See also *Teamsters* v. *United States*, *supra*, 431 U. S. at 348, n. 30.

[3] The complaint also alleged, under 29 U. S. C. §§ 159 and 185, that the union defendants had breached their duty of fair representation by, among other things, negotiating "unreasonable privileges from some employers over others. . . ."

[4] In this Court, the respondent emphasizes that he has not contended that there is anything illegal in classifying employees as permanent and temporary or in according greater rights to permanent than to temporary employees. His sole Title VII challenge in this respect has been to the 45-week rule on its face and as it has been applied by the defendant unions and employers.

[5] The Agreement classifies employees into brewers, bottlers, drivers, shipping and receiving clerks, and checkers. Under the Agreement, separate seniority lists have to be maintained for each of these classifications of employees. The respondent is a brewer.

[6] An employee may also lose permanent status if he "quits the industry" or is discharged for certain specified reasons.

[7] In addition, permanent employees are given preference over temporary employees with respect to various other employment matters, such as the right to collect supplemental unemployment benefits upon layoff, wages and vacation pay, and choice of vacation times.

increase as the length of an employee's service increases." *Id.*, at 426. The court pointed out that under the Agreement some employees in the industry could acquire permanent status after a total of only 45 weeks of work if those weeks were served in one calendar year, while others "could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year." *Id.*, at 426–427.

The Court of Appeals concluded that "while the collective bargaining agreement does contain a seniority system, the 45-week provision is not a part of it." *Id.*, at 427:

> "The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e. g.*, an academic degree requirement) or classification device (*e. g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line." *Id.*, at 427, n. 11.[8]

Accordingly, the Court of Appeals remanded the case to the District Court to enable the respondent to prove that the 45-week provision has had a discriminatory impact on Negroes under the standards enunciated in *Griggs* v. *Duke Power Company, supra.* *Id.*, at 427–428.[9]

II

Title VII does not define the term "seniority system," and no comprehensive definition of the phrase emerges from the legislative history of § 703 (h).[10] Moreover, our cases have not purported to delineate the contours of its meaning.[11] It is appropriate, therefore, to begin with commonly accepted notions about "seniority" in industrial relations, and to consider those concepts in the context of Title VII and this country's labor policy.

In the area of labor relations, "seniority" is a term that connotes length of employment.[12] A "seniority system" is a scheme that, alone or in tandem with non-"seniority" criteria,[13] allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase.[14] Unlike other methods of allocating employment benefits and opportunities, such as subjective evaluations or educational requirements, the principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.

Viewed as a whole, most of the relevant provisions of the Agreement before us in this case conform to these core concepts of "seniority." Rights of temporary employees and rights of permanent employees are determined according to length of plant employment in some respects, and according to length of industry employment in other respects. Notwithstanding this fact, the Court of Appeals concluded that the 45-week rule should not be viewed, for purposes of § 703 (h), as part of what might otherwise be considered a "seniority system." For the reasons that follow, we hold that this conclusion was incorrect.

First, by legislating with respect to "systems"[15] of seniority in § 703 (h), Congress in 1964 quite evidently intended to exempt from the normal operation of Title VII more than simply those components of any particular seniority scheme that, viewed in isolation, embody or effectuate the principle that length of employment will be rewarded. In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment.[16] For instance, every seniority system must include rules that delineate how and when the seniority time clock begins ticking,[17] as well as rules that specify how and when a particular person's seniority may be forfeited.[18] Every seniority system must also have rules that define which passages of time will "count" towards the accrual of seniority and which will not.[19] Every seniority system must, moreover, contain rules that particularize the types of employment conditions that will be governed or influenced by seniority, and those that will not.[20] Rules that serve these necessary purposes do not fall outside § 703 (h) simply because they do not, in and of themselves, operate on the basis of some factor involving the passage of time.[21]

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[8] The Court of Appeals also observed that "the 45-week requirement makes the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status." 585 F. 2d, at 427. This danger, according to the court, is almost never present in any "true" seniority system, in which rights "usually accumulate automatically over time. . . ." *Ibid.*

[9] The Court of Appeals directed the trial court on remand to consider as well the respondent's claims under 42 U. S. C. § 1981, and 29 U. S. C. §§ 159 and 185.

[10] See 110 Cong. Rec. 1518, 5423, 7207, 7213, 7217, 12723, 15839 (1964). The example of a "seniority system" most frequently cited in the congressional debates was one that provided that the "last hired" employee would be the "first fired." Nowhere in the debates, however, is there any suggestion that this model was intended to be anything other than an illustration.

[11] See *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63; *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553; *Teamsters* v. *United States*, 431 U. S. 324; *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747.

[12] Webster's Third New International Dictionary of the English Language Unabridged (1961) defines "seniority," in pertinent part, as the "status attained by length of continuous service . . . to which are attached by custom or prior collective agreement various rights or privileges . . . on the basis of ranking relative to others. . . ."

[13] A collective-bargaining agreement could, for instance, provide that transfers and promotions are to be determined by a mix of seniority and other factors, such as aptitude tests and height requirements. That the "seniority" aspects of such a scheme of transfer and promotion might be covered by § 703 (h) does not mean that the aptitude tests or the height requirements would also be so covered.

[14] See E. Beal, E. Wickersham & P. Kienast, The Practice of Collective Bargaining 430–431 (1972); Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969); Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962).

[15] Webster's Third New International Dictionary of the English Language Unabridged (1961) defines "system," in pertinent part, as a "complex unity formed of many often diverse parts subject to a common plan or serving a common purpose."

[16] See generally S. Slichter, J. Healy, R. Livernash, The Impact of Collective Bargaining on Management 115–135 (1960).

[17] By way of example, a collective-bargaining agreement could specify that an employee begins to accumulate seniority rights at the time he commences employment with the company, at the time he commences employment within the industry, at the time he begins performing a particular job function, or only after a probationary period of employment.

[18] For example, a collective-bargaining agreement could provide that accumulated seniority rights are permanently forfeited by voluntary resignation, by severance for cause, or by nonemployment at a particular plant or in the industry for a certain period.

[19] For instance, the time an employee works in the industry or with his current employer might not be counted for the purpose of accumulating seniority rights, whereas the time the employee works in a particular job classification might determine his seniority.

[20] By way of example, a collective-bargaining agreement could provide that an employee's seniority will govern his entitlement to vacation time and his job security in the event of layoffs, but will have no influence on promotions or job assignments.

[21] The examples in the text of the types of rules necessary to the operation of a seniority system are not intended to and do not comprise an exhaustive list.

Second, Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's long-standing labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *United Steelworkers* v. *Weber*, 443 U. S. —. It does not behoove a court to second-guess either that process or its products. *Porter Co.* v. *NLRB*, 397 U. S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703 (h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U. S., at 355, n. 41.

What has been said does not mean that § 703 (h) is to be given a scope that risks swallowing up Title VII's otherwise broad prohibition of "practices, procedures and tests" that disproportionately affect members of those groups that the Act protects. Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of § 703 (h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority. There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a "seniority system" within the intendment of § 703 (h).

The application of these principles to the case at hand is straightforward. The Agreement sets out, in relevant part, two parallel seniority ladders. One allocates the benefits due temporary employees; the other identifies the benefits owed permanent employees. The propriety under § 703 (h) of such parallel seniority tracks cannot be doubted after the Court's decision in the *Teamsters case*. The collective-bargaining agreement at issue there allotted one set of benefits according to each employee's total service with the company, and another set according to each employee's service in a particular job category. Just as in that case the separation of seniority tracks did not derogate from the identification of the provisions as a "seniority system" under § 703 (h), so in the present case the fact that the system created by the Agreement establishes two or more seniority ladders does not prevent it from being a "seniority system" within the meaning of that section.

The 45-week rule, correspondingly, serves the needed function of establishing the threshold requirement for entry into the permanent employee seniority track. As such, it performs the same function as did the employment rule in *Teamsters* that provided that a line-driver began to accrue seniority for certain purposes only when he started to work as a line driver, even though he had previously spent years as a city driver for the same employer. In *Teamsters*, the Court expressed no reservation about the propriety of such a threshold rule for § 703 (h) purposes. There is no reason why the 45-week threshold requirement at issue here should be considered any differently.

The 45-week rule does not depart significantly from commonly accepted concepts of "seniority." The rule is not an educational standard, an aptitude or physical test, or a standard that gives effect to subjectivity. Unlike such criteria, but like any "seniority" rule, the 45-week requirement focuses on length of employment.

Moreover, the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits. A temporary employee's chances of achieving permanent status increase inevitably as his industry employment and seniority accumulate. The temporary employees with the most industry seniority have the first choice of new jobs within the industry available for temporary employees. Similarly, the temporary employees with the most plant seniority have the first choice of temporary employee jobs within their plant and enjoy the greatest security against "bumping" by permanent employees from nearby plants. As a general rule, therefore, the more seniority a temporary employee accumulates, the more likely it is that he will be able to satisfy the 45-week requirement. That the correlation between accumulated industry employment and acquisition of permanent employee status is imperfect does not mean that the 45-week requirement is not a component of the Agreement's seniority system. Under any seniority system, contingencies such as illnesses and layoffs may interrupt the accrual of seniority and delay realization of the advantages dependent upon it."

For these reasons, we conclude that the Court of Appeals was in error in holding that the 45-week rule is not a component of a "seniority system" within the meaning of § 703 (h) of Title VII of the Civil Rights Act of 1964. In the District Court the respondent will remain free to show that, in respect to the 45-week rule or in other respects, the seniority system established by the Agreement is not "bona fide," or that the differences in employment conditions that it has produced are "the result of an intention to discriminate because of race."

For the reasons stated, the judgment before us is vacated, and the case is remanded to the Court of Appeals for the Ninth Circuit for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

In the California brewing industry, an employee's rights and benefits are largely dependent on whether he is a "permanent" employee within the meaning of the collective-bargaining agreement. Permanent employees are laid off after all othe employees. If laid off at one facility, a permanent employee is permitted to replace the least senior nonpermanent employee at any other covered facility within the local area. Permanent employees are selected before temporary employees to fill vacancies. They have exclusive rights to supplemental unemployment benefits upon layoff and receive higher wages and vacation pay for the same work performed by other employees. Permanent employees have first choice of vacation times, less rigorous requirements for qualifying for holiday pay, exclusive access to veterans' reinstatement and seniority rights, and priority in assignment of overtime work among bottlers.

[1] There are indications in the record of this case that a long-term decline in the California brewing industry's demand for labor is a reason why the accrual of seniority as a temporary employee has not led more automatically to the acquisition of permanent status. But surely, what would be part of a "seniority system" in an expanding labor market does not become something else in a declining labor market.

According to respondent's complaint, no Negro has ever attained permanent employee status in the California brewing industry.[1]

The provision of the collective-bargaining agreement at issue here defines a permanent employee as one "who . . . has completed forty-five weeks of employment . . . in one classification in one calendar year as an employee of the brewing industry in this State." An employee who works 44 weeks per year for his entire working life remains a temporary employee. By contrast, an employee who works 45 weeks in his first year in the industry attains permanent employee status. This simple fact belies the Court's conclusion that the 45-week requirement "does not depart significantly from commonly accepted concepts of 'seniority.'" *Ante*, at 11. Since I am unable to agree that the provision at issue is part of a "seniority system" under § 703 (h) of Title VII, I dissent.

I

Neither Title VII nor its legislative history provides a comprehensive definition of the term "seniority system."[2] The Court is therefore correct in concluding that the term must be defined by reference to "commonly accepted notions about 'seniority' in industrial relations" and "in the context of Title VII and this country's labor policy." *Ante*, at 6. Those "commonly accepted notions," however, do not lead to the Court's holding today. And I believe that the relevant policies do not support that holding, but instead require that it be rejected.

The concept of "seniority" is not a complicated one. The fundamental principle, as the Court recognizes, *ante*, at 7, is that employee rights and benefits increase with length of service. This principle is reflected in the very definition of the term, as found in dictionaries[3] and treatises and articles in the field of industrial relations.[4] To quote from a few of the sources on which the Court purports to rely today: "Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement." Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962). "The variations and combinations of seniority principles are very great, but in all cases the basic measure is length of service, with preference accorded to the senior worker." Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969). "Seniority grants certain preferential treatment to long-service employees almost at the expense of short-service employees. . . . [S]eniority is defined as length of service." E. Beal, E. Wickersham, & P. Kienast, The Practice of Collective Bargaining 430 (1972).

It is hardly surprising that seniority has uniformly been defined in terms of cumulative length of service. No other definition could accord with the policies underlying the recognition of seniority rights. A seniority system provides an objective standard by which to ascertain employee rights and protections, thus reducing the likelihood of arbitrariness or caprice in employer decisions. At the same time it promotes stability and certainty among employees, furnishing a predictable method by which to measure future employment position. See, *e. g.*, Sayles, Seniority: An Internal Union Problem, 30 Harv. Business Rev. 55 (1952); C. Golden & H. Ruttenberg, The Dynamics of Industrial Democracy 128–131 (1942); Cooper & Sobol, *supra*, 82 Harv. L. Rev., at 1604–1605.

The Court concedes this general point, recognizing that a "'seniority system' is a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *Ante*, at 6–7 (footnote omitted). In my view, that concession is dispositive of this case. The principal effect of the 45-week requirement is to ensure that employee rights and benefits in the California brewing industry are not "ever improving" as length of service increases. Indeed, cumulative length of service is only incidentally relevant to the 45-week rule. The likelihood that a temporary employee will attain permanent employee status is largely unpredictable. The 45-week period, which is exclusive of vacation, leaves of absence, and time lost because of injury or sickness, represents almost 90% of the calendar year. Even if an employee is relatively senior among temporaries, his ability to work 45 weeks in a year will rest in large part on fortuities over which he has no control. The most obvious reason that employees have been prevented from attaining permanent employee status—a reason barely referred to by the Court—is that the brewing industry is a seasonal one. An employee may also be prevented from becoming permanent because of replacement by permanent employees or an employer's unexpected decision to lay off a particular number of employees during the course of a year.[5] It is no wonder

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[1] In the present procedural posture of the case, of course, the allegations of the complaint must be accepted as true.

[2] The legislative history does, however, provide a bit more guidance than the Court admits. The fact that the sole example of a seniority system given in the congressional debates is one in which rights increase with cumulative length of service is at least suggestive. See *ante*, at 6, n. 9.

[3] See, *e. g.*, Webster's Third New International Dictionary 2066 (1961) ("a status attained by length of continuous service [as in a company . . .] to which are attached by custom or prior collective agreement various rights and privileges"); Random House Dictionary of the English Language 1299 (1966) ("priority, precedence, or status obtained as the result of a person's length of service"); Black's Law Dictionary 1222 (5th ed. 1979) ("As used with reference to job seniority, worker with most years of service is first promoted within range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service"); Ballentine's Law Dictionary 1160 (1969) ("the principle in labor relations that length of employment determines the order of layoffs, rehirings, and advancements").

[4] See, *e. g.*, Roberts' Dictionary of Industrial Relations 390 (1966) ("The length of service an individual employee has in the plant. . . . The seniority principle rests on the assumption that the individuals with the greatest length of service within the company should be given preference in employment"); United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 908–11, at 1 (1949) ("A seniority program aims to provide maximum security in employment to those with the longest service"); E. Dangel & I. Shriber, The Law of Labor Unions § 15 (1941) ("Seniority . . . is an employment advantage in the matter of choice of and the right to work in one's occupation on the basis of an employee's length of service"); BNA, Collective Bargaining Contracts, Techniques of Negotiation and Administration with Topical Classification of Clauses 488 (1941) ("The term [seniority] refers to length of service with the employer or in some division of the enterprise"); Meyers, The Analytic Meaning of Seniority, Industrial Relations Research Association, Proceedings of Eighteenth Annual Meeting 194 (1966) ("Seniority is the application of the criterion of length of service for the calculation of relative equities among employees"); McCaffrey, Development and Administration of Seniority Provisions, Proceedings of NYU 2d Annual Conference on Labor 132 (1949) ("seniority may be defined as the length of company-recognized service as applied to certain employer-employee relationships"); Christenson, Seniority Rights under Labor Union Working Agreements, 11 Temp. L. Q. 335 (1937) ("seniority is a rule providing that employers promote, lay off and re-employ labor, according to length of previous service"). Cf. P. Selznick, Law, Society, and Industrial Justice 203 (1969) (referring to the "'rather general feeling that a worker who has spent many years on his job has some stake in that job and in the business of which it is a part'").

[5] Indeed, the agreement expressly provides that a permanent employee laid off at one facility will replace (or "bump") the temporary employee with the lowest *plant* seniority, even if that employee has more industry seniority than others. As a result, temporaries who are relatively senior in terms of industry seniority may have less opportunity to work 45 weeks in a calendar year than temporaries with less industry seniority but more plant seniority. Thus, it is simply not true that temporary employees

that the accrual of seniority by temporary employees has not led with any regularity to the acquisition of permanent employee status.[8] In sum, the 45-week rule does not have the feature of providing employees with a reasonably certain route by which to measure future employment position. So understood, the 45-week rule has very little to do with seniority, for it makes permanent status turn on fortuities over which the employee has no control, not on length of service with the employer or in the relevant unit.

The Court avoids this conclusion by little more than assertion. It observes that the 45-week rule acts as a threshold requirement for entry onto the seniority track composed of permanent employees, but eliminates the force of that observation with the inevitable concession that such threshold requirements are not necessarily entitled to § 703 (h) exemption.[9] It notes that the 45-week requirement "focuses on length of employment," and proceeds to the unexplained conclusion that it therefore "does not depart significantly from commonly accepted concepts of 'seniority.'" And it adds that more senior temporary employees tend to have a greater opportunity to obtain work and thus to attain permanent status through 45 weeks of employment in a calendar year.

The Court's analysis, of course, is largely dependent on its conclusion that since the 45-week requirement is one measured by time of service, it does not depart from common concepts of seniority. That conclusion, however, is foreclosed by the Court's own definition of a seniority system as one in which employee rights increase with cumulative length of service—not length of service within a calendar year. The mere fact that the 45-week rule is in some sense a measure of "time" does not demonstrate a valid relation to concepts of seniority. Such a conclusion would make the § 703 (h) exemption applicable to a rule under which permanent employee status is dependent on number of days served within a week, or hours served within a day.[10]

Nor is there much force to the suggestion that the 45-week requirement somehow becomes part of a seniority system because permanent employee status is more easily achieved by the more senior temporary employees. I could agree with the Court's decision if petitioners demonstrated that the collective-bargaining agreement actually operates to reward employees in order of cumulative length of service. But at this stage of the litigation there is no evidence that temporary employees attain permanent status in a way correlating even roughly with total length of employment. The mere possibility that senior temporary employees are more likely to work for 45 weeks is, in my view, insufficient.[11] It might as well be said that a law conditioning permanent employee status on the attainment of a certain level of skill is a "seniority" provision since skills tend to increase with length of service. A temporary employee is always subject to a risk that for some reason beyond his control, he will be unable to work the full 45 weeks and be forced to start over again.

II

Since the 45-week rule operates as a threshold requirement with no relation to principles of seniority, I believe that the rule is for analytical purposes no different from an educational standard or physical test which, as the Court indicates, is plainly not entitled to § 703 (h) exemption. Accordingly, I think it clear that the 45-week requirement is not part of a "seniority system" within the meaning of § 703 (h). But if the question were perceived to be close, I would be guided by the familiar principle that exemptions to remedial statutes should be construed narrowly. "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *Phillips Co.* v. *Walling*, 324 U. S. 490, 493 (1945). See, *e. g.*, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, — U. S. —, — (1979); *Abbott Laboratories* v. *Portland Retail Druggists Assn.*, 425 U. S. 1, 12 (1976); *Peyton* v. *Rowe*, 391 U. S. 54, 65 (1968). The effect of § 703 (h) is to exempt seniority systems from the general prohibition on practices which perpetuate the effects of racial discrimination. This exception is a limited one in derogation of the overarching purpose of Title VII, "the integration of blacks into the mainstream of American society," *United Steelworkers of America* v. *Weber*, — U. S. —, — (1979). A statute designed to remedy the national disgrace of discrimination in employment should be interpreted generously to comport with its primary purpose; exemptions should be construed narrowly so as not to undermine the effect of the general prohibition. Today the Court not only refuses to apply this familiar principle of statutory construction, it does not even acknowledge it.

In my view, the Court's holding is fundamentally at odds with the purposes of Title VII and the basic function of the § 703 (h) exemption. I dissent.[12]

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obtain permanent employee status in order of cumulative length of employment, for the requisite 45 weeks is computed on the basis of service in the industry rather than in particular plants.

[8] The Court acknowledges this point, *ante*, at 11, n. 22, but responds that a system which would fall within § 703 (h) in an expanding labor market does not lose that status by virtue of the fact that the labor market is contracting. In the Court's words, however, the question is whether the 45-week rule is a part of a seniority system because it "allots to employees ever improving rights and benefits as their relative lengths of pertinent employment increase." In that context it is surely relevant whether the 45-week provision does in fact operate to reward cumulative length of service, or serves instead as a virtually impassable barrier to advancement.

[9] As the Court's own analysis suggests, the 45-week provision is entirely different from the seniority provisions involved in *Teamsters* v. *United States*, 431 U. S. 324 (1977). At issue in that case was a seniority system granting some benefits on the basis of an employee's cumulative length of service with the company, and others on the basis of cumulative length of service in a particular job category. In both cases employee rights and benefits depended on total length of service in the relevant unit, not on the length of service within a calendar year.

[10] For example, there can be no serious question that a provision making permanent status dependent on seven days of work per week, or twelve hours per day, would not be part of a "seniority system" within the meaning of § 703 (h).

[11] I could understand, although I do not favor, a decision remanding this case for factual findings on the question whether temporary employees in fact acquire permanent status and, if so, whether they do so in order of cumulative length of service. In my view, it is extraordinary for the Court to conclude, in a factual vacuum and on the authority of nothing other than petitioner's word, that "the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits." See also n. 5, *supra*.

[12] To decide this case we are not required to offer a complete definition of the term "seniority system" within the meaning of § 703 (h). Nor are we called upon to canvass and evaluate rules "ancillary" to seniority systems. The question whether all of the rules listed by the Court, *ante*, at 8-9, are part of a seniority system is not at all easy, and the Court's own reasoning demonstrates that its discussion of these rules is gratuitous and does little to advance analysis of the 45-week requirement. That requirement serves none of the functions of an "ancillary" rule.